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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and THE OHIO RIVER COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Chicago & Eastern Illinois Railroad Company (C&EI) and The Ohio River Company (River Company), plaintiffs in the court below, submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the questions presented by the appeal are substantial and are of public importance.

OPINIONS BELOW.

The findings of fact and conclusions of law of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, filed March 25, 1963, are attached hereto as Appendix A. The judgment dismissing the complaint, entered the same date, is attached as Appendix B. The report of the Interstate Commerce Commission, the validity of whose order is at issue in this case, is reported at 315 I.C.C. 129 and is attached hereto as Appendix C. The order of the Commission, dated November 20, 1961, implementing that report is attached as Appendix D. The order of the Interstate Commerce Commission denying appellants' petition for reconsideration is attached as Appendix E.

JURISDICTION.

This is an action, commenced by C&EI and River Company pursuant to the provisions of 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. § 1009, to enjoin, suspend, annul, and set aside a report and order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 7368, *Barge-Rail Coal from Huntington, W. Va., to Chicago District* and Investigation and Suspension Docket No. 7524, *Coal via Barge-Rail from Huntington, W. Va. to Chicago, Ill. District.* The judgment dismissing the complaint was filed on March 25, 1963, and a notice of appeal was filed by appellants in the United States District Court for the Northern District of Illinois on May 17, 1963.

Jurisdiction of the Supreme Court to review the judgment of the three-judge District Court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). This juris-

diction is sustained by a number of cases, including *I.C.C.* v. *New York, N.H. & H. R. Co.*, ... U.S. .....; 10 L.Ed. 2d 108 (1963) and *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962).

STATUTES INVOLVED.

This appeal involves the national transportation policy (note preceding 49 U.S.C. § 1) and sections 1(5), 3(4), and 14(1), of the Interstate Commerce Act (49 U.S.C. §§ 1(5), 3(4) and 14(1), and section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)). The text of those provisions is set forth in Appendix F hereto.

QUESTIONS PRESENTED.

(1) Where the Interstate Commerce Commission condemns a rate on the sole basis that it is below cost, must it make the findings necessary to show how it has resolved the conflicting cost factors submitted by the parties in order that the parties and a reviewing court may know whether the Commission's decision had a rational basis and was supported by substantial evidence of record?

(2) Where a railroad voluntarily joins a barge line in a joint barge-rail rate from which the railroad receives revenues no less than it accepts for a similar service out of competitive all-rail rates from the same origin territory to the same destination, may the Interstate Commerce Commission, consistent with Section 3(4) of the Interstate Commerce Act, condemn the barge-rail rate which merely gives the barge line participant the opportunity to compete with the all-rail rate on a non-discriminatory basis?

STATEMENT OF THE CASE.

This case involves the validity of an order of the Interstate Commerce Commission requiring the C&EI and River Company to cancel a joint barge-rail rate of $3.36 per ton for the movement of bituminous fine coal, in minimum lots of 5,000 net tons, from Huntington, West Virginia to the Chicago, Illinois district.[1] The rate contemplates barge transportation of coal tendered in cars to the River Company at Huntington, West Virginia via the Ohio River to Mount Vernon, Indiana, the transfer of the coal into rail cars at that point, and the rail transportation from Mount Vernon to Chicago, Illinois by the C&EI.

The coal involved is metallurgical coal which is used in making steel by the Chicago area mills. The movement of this coal via the several available routes approximates 20,000,000 tons per year, but fluctuates from year to year. The barge-rail movement has accounted for approximately 1,000,000 tons per year of this coal traffic since its beginning in 1953. The balance of the movement is handled by the all-rail or rail-lake routes,[2] with the great preponderance moving via the all-rail route.

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[1] The rate was originally published as $3.33 per ton to become effective on June 1, 1960, but was suspended in Investigation and Suspension Docket No. 7368, *Barge-Rail Coal from Huntington, W. Va., to Chicago District.* To conform to the general increase on coal subsequently authorized throughout the country in Ex Parte No. 223, the $3.33 rate was increased to $3.36 per ton by schedules published to become effective on February 2, 1961. The $3.36 rate was suspended in Investigation and Suspension Docket No. 7524, *Coal via Barge-Rail from Huntington, W. Va. to Chicago, Ill. District.* The assailed report and order of the Commission embraced both proceedings and, since the $3.36 rate supplants the $3.33 rate, only the $3.36 rate need be considered.

[2] Via rail from mine to Lake Erie ports and lake vessel beyond to Chicago.

The railroads which dominate the movement are the eastern railroads[3] directly serving the mines which produce this coal. Consistent with general railroad policy, and notwithstanding the provisions of the Interstate Commerce Act to the contrary (specifically, sections 3(4) and 15(3) and (4) thereof (49 U.S.C. §§ 3(4) and 15(3) and (4)), those Eastern railroads refused to join with the River Company or any other barge line in publishing joint barge-rail rates for this coal traffic. They would not join with the River Company because to do so would "short haul" them (since the water haul would displace a generally parallel rail haul) and would establish a competitive route. Because of the inherent cheapness of water transportation, the barge-rail route thus established would be cheaper and, to that extent, more attractive than the competing all-rail routes.

The conditions which caused the Eastern lines to refuse participation in barge-rail routes were not operative as to the C&EI. The C&EI's service is complementary to rather than competitive with the barge movement from river loading ports in the east to rail interchange at Mt. Vernon, Indiana. The C&EI welcomed participation in the barge-rail route because it had been denied participation in all-rail routing on eastern coal to Chicago, with one exception. The one exception—its participation with the Louisville & Nashville Railroad Company via Evansville, Indiana, in coal traffic from L&N mines to Chicago—is the circumstance which gives rise to the second question presented by this appeal.

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[3] These are the railroads who protested the barge-rail rate before the Commission and are the intervening defendants here. They will, for convenience, be called the Eastern railroads or lines hereinbelow.

The $3.36 joint barge-rail rate which was ordered canceled by the Commission report under review represents a unique experiment in cooperative joint rail-water rates. Heretofore, such joint rates have been established only by compulsion after lengthy litigation before the Interstate Commerce Commission and the federal courts. This has been a tedious and time-consuming process, with which this Court is well familiar. See *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); and *Arrow Transportation Company* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959) Aff'd *per curiam* 361 U.S. 353 (1960). While the instant case, too, is now before this Court, the ascent has been by a different path. Here the C&EI voluntarily agreed to join its barge line connection in a joint barge-rail rate on a basis which, though not so low as it accepted out of the paralleling all-rail rate for a substantially similar service by it, was still low enough, when combined with the amount received by the water carrier, to make a through rate attractive to the shipper.

The joint barge-rail rate so established was attacked by the same Eastern railroads which refused to join the River Company in joint barge-rail rates, including the same Eastern railroad which only agreed to join the C&EI in all-rail rates on a basis which gave the C&EI $1.66 per ton for the Evansville-Chicago movement. Their attack was upon the ground that the barge-rail rate was not compensatory.[4]

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[4] The River Company receives $1.32 per ton as its division of the assailed $3.36 barge-rail rate. That division is well above the $1.268 per ton cost which the Eastern railroads assigned against the barge movement, the cost which the Commission accepted in its report. The allegation of unlawfulness, therefore, was directed squarely against the rail division for the rail segment of the through movement.

The barge-rail movement of coal from Eastern mines to Chicago began in 1953 with the establishment of a "proportional"[5] rail rate by the C&EI from Mt. Vernon to Chicago of $1.89 per ton. The $1.89 rate was protested by the Eastern railroads and, after hearing, was approved by the Commission in *Ex-River Coal From Mount Vernon, Ind., to Chicago*, 296 I.C.C. 489 (Div. 2, 1955). The $1.89 rate became $2.08 through the application of general *Ex Parte* increases subsequently authorized for nation-wide application to all traffic. On September 8, 1958, the C&EI sought to reduce its rate back to $1.89 but the reduction was suspended and, after hearing, required to be cancelled. The cancellation was ordered on a finding that the $1.89 rate failed to cover out of-pocket costs, which were found to be $2.045 per ton. *Ex-River Coal, Mount Vernon, Ind., to Chicago District*, 310 I.C.C. 181 (Entire Comm., 1960).

The barge-rail movement of coal, prior to the establishment of the joint rate here involved, entailed the issuance of separate bills of lading by the River Company and the C&EI covering their respective segments of the through journey. This, in turn, required extra paper work on the part of the carriers and the performance by the C&EI of the service of weighing each car so as to assess the proper freight charges. After the Commission had stricken down the C&EI's attempt to re-establish the $1.89 proportional rate, the $3.36 joint rate here involved was published in order:

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[5] A proportional rate is one which applies only to traffic which has a prior or subsequent movement to or from the origin or destination between which it applies and is normally lower than the "local" rate which applies to other traffic moving between the same points.

(1) to restore the competitive *vis-a-vis* the all-rail rate which had been disrupted by a 29-cent reduction in the all-rail rate in 1958,[6]

(2) to attain the economies resulting from eliminating rebilling and weighing by the C&EI, and

(3) to provide the C&EI with a division ($2.04) approximating the costs found accurate by the Commission for a more burdensome rail service under the proportional rate.

The $3.36 joint rate established by the C&EI and the River Company was an initial publication of charges applicable to the joint barge-rail service. As such, the publishing carriers took the position before the Commission that the burden of proof rested with the Eastern railroads who attacked the rate as unlawful. While this position was contested by the Eastern railroads, the Commission, without actually resolving the issue, apparently proceeded on the assumption that the Eastern railroads had the burden of proof. In condemning the $3.36 rate, the Commission found "that the proposed schedules are unjust and unreasonable." (App. 15) That conclusion was rested solely upon the ground that the rate was non-compensatory when measured against the $3.416 per ton cost found by the Commission to be accurate for the through barge-rail service.

The record before the Commission is largely comprised of the conflicting cost studies introduced by the parties in support of their respective positions. The studies of rail cost were predicated on Rail Form A which is an accounting formula developed by the Commission's Cost

[6] Which reduction was approved by the Commission in *Eastern Coal To Chicago, Ill.*, 306 I.C.C. 195 (Div. 2, 1959).

Finding Section to determine unit costs for a railroad or group of railroads by relating expenses incurred in a given year to the services performed in that year. The cost data is accumulated by service category, to the extent possible, and related to the appropriate service units so as to develop an average cost per service unit *e.g.*, per ton mile or per switching minute etc. The source for the primary data is the carriers' annual reports to the Commission, as supplemented by special study data.

Average costs per service unit were developed based on the application of Rail Form A to the C&EI's annual reports. The costs per service unit so determined were then applied to the various categories of service units applicable to the rail movement from Mt. Vernon to Chicago. The rail service from Mt. Vernon to Chicago was divided into ten separate service categories, for each of which a cost was computed and assigned. The Commission's "restated" costs were different from either those submitted by the C&EI or by the Eastern railroads, except for two of the ten service cost categories (switching absorption and non-compensated car expense at Chicago—lines 7 and 8 in the table below) where the Commission accepted the Eastern lines' figure without adjustment. The table below sets forth the costs submitted by the C&EI and the Commission's restatement of the costs, both of which have been reproduced here directly from the appendix to the Commission's report, and also shows the costs submitted by the Eastern railroads:

omparison of out-of-pocket costs of handling coal from Mount Vernon, Ind., Chicago, Ill., as computed by the Chicago & Eastern Illinois; as computed y the Eastern railroads; and as restated by the Commission in its report at 315 C.C. 133 (App. 16).

ine No.	Item	Chicago & Eastern Illinois	Eastern Railroads	Restated by Commission
1.	Origin terminal cost at Mount Vernon	$10.0047	$12.7064	$12.4448
	Line-haul cost, Mount Vernon to Chicago, 285.1 miles:			
2.	Net ton-mile cost	31.2169	30.2490	31.0002
3.	Car-mile cost	34.8843	36.2768	37.2138
4.	Switching cost at Mount Vernon Junction	2.3769	2.8310	2.8984
5.	Switching cost at Brewer Yard	0	3.8394	2.8128
6.	Interchange cost at Chicago	8.3367	9.5290	9.7654
7.	Switching absorption at Chicago	36.4182	36.4182	36.4182
8.	Non-compensated freight-car expense at Chicago	5.0022	10.0655	10.0655
	Total cost per carload	128.2399	141.9153	142.6191
	Total cost per ton, Indiana Harbor Belt termination	1.923	2.1277	2.1382
	Line-haul cost, Yard Center to Chicago:			
9.	Net ton-mile cost	1.0987	1.0875	1.1145
10.	Car-mile cost	1.2393	1.3657	1.4010
	Total cost per carload	130.5779	144.3685	145.1346
	Total cost per ton, Pennsylvania Railroad termination	1.958	2.1644	2.1759
	Weighted-average cost per ton	1.932	2.1364	2.1476
	Increased by 2.9 percent*		2.1964	

* The Eastern railroads applied this increase factor purportedly to reflect increases in rail wages and prices from 1959, the year studied, to year 1960. he Commission's cost items shown above already include a 2.9 percent increase, ut applied in a different method from that used by the protestants.

The different costs assigned to each of the indicated service components by the C&EI and the Eastern railroads result from the different service units assumed in each category and the costs per service unit applied. The parties stated and developed their positions at considerable length at the hearing and in the briefs filed to the Commission, and the outcome of the case hinged upon the Commission's resolution of these conflicting positions. The Commission, in restating rail cost at a level different than sponsored by either party, did not choose to explain the process used or evidence relied upon in reaching its "restated" costs, except for the most generalized statements in the text and footnotes to the Appendix, which, respectively, read as follows:

> As shown in the appendix, the restatement of these costs reflects the 1959 annual-report data of the Chicago & Eastern Illinois. We have adjusted the operating expenses, rents, and taxes (other than Federal income) by 2.9 percent for wage and price increases to July 1, 1960. We have used 4 days' detention of cars at Chicago. The elimination of the cost of weighing at Brewer Yard does not support the contention of the Chicago & Eastern Illinois that the entire intertrain and intratrain switching expenses at that point should be excluded. System average intertrain and intratrain switching costs are computed at $3.3571 per minute. The record shows that at Brewer Yard the switching, exclusive of weighing, requires 0.83788 minute per car, reflecting a cost of $2.8128 per car. In the *Ex-River Coal* case this cost was stated as $2.716. On this basis the weighted-average out-of-pocket cost of $2.1476 a ton exceeds $2.04, the amount that the Chicago & Eastern Illinois would receive as its division for moving this traffic. It follows that the revenue from the proposed rate would not yield out-

of-pocket cost on the Chicago & Eastern Illinois. (App. 14)

• • •

1 The Chicago & Eastern Illinois' costs and those restated include a weight of 66.7 tons per car, and an empty return ratio of 91 percent. The Chicago & Eastern Illinois' costs are based upon application of Rail Form A to 1957 operating expenses. Special study data from the report of the Commission in the *Ex-River Coal* case have been further adjusted.

2 Costs were obtained from the protestants' Rail Form A application to the 1959 annual report data of the Chicago & Eastern Illinois, with an adjustment of 2.9 percent for wage and price increases to July 1, 1960.

3 While we have eliminated the cost of weighing at this point, we have included intertrain and intratrain switching costs.

4 The Chicago & Eastern Illinois used 2.67 days' detention at Chicago. However, the record fully supports the use of 4 days' detention at Chicago. On such a basis the restated cost would total $10.0655.

5 Weighted-average cost based upon 25 percent tonnage to The Pennsylvania Railroad Company and 75 percent to the Indiana Harbor Belt Railroad Company. (App. 16)

Thus it is clear that the Commission (1) used the 1959 unit cost from the Eastern railroads' study, (2) used 4 days' car detention at Chicago, (3) tried to separate weighing from switching at Brewer Yard and include cost only for the latter and (4) intended to trend the 1959 unit costs in a manner different from that employed by the Eastern railroads who developed the trending factor.

The process for separating the weighing and switching at Brewer Yard is not explained and the methods used in applying the trending factor are also left to surmise. The catch-all explanation for the restated cost in footnote (2) could as well be given, with as much descriptiveness and accuracy of the Eastern Railroads unadjusted as of the Commission's restated costs.

The lack of an intelligible statement of what the Commission had done is reflected in the following excerpt from appellants' Argument in Support of their Petition for Reconsideration of the report under review (page 5):

> But the Commission did not adopt the protestants' formula for costing this movement, or at least it does not appear that it did. Certainly the Commission intended to exclude the cost of weighing the coal at Brewer but offset the resulting reduction in cost by an error which seems unexplainable. Also, the Commission apparently accepted Mr. Woodin's testimony that errors in computing the switching costs at origin had been made. In addition, the Commission excluded the item for switching costs at Yard Center, amounting to 3.7 cents per ton. As nearly as we can reconstruct the second column of the appendix of the report to consider the elimination of the Western Indiana costs from the tonnage moving via the I.H.B. and adding in the specific wheelage charges on the traffic moving via the Pennsylvania, the result would be as follows:

Two pages later in the same petition, appellants urged the Commission to correct an assumed error in the determination of origin car detention:

> The cost study of the Commission does not, however, consider the proper car detention at origin . . . . weighed average detention from these two studies disclose that the average detention at origin is 1.804 days. (Page 7)

After the Commission's order had been challenged in the court below the Commission disclosed (in its brief to the lower court) that it *had* incorporated the 1.804 car detention factor at Mt. Vernon in its restated cost. At least the attorneys charged with defending the Commission order said that it had (see October 19, 1962 joint brief of the United States of America and Interstate Commerce Commission, Appendix B, Sheet 2, Line 7 and Footnote 1.)

The result of the Commission's failure to say that it had accepted appellants' contention in this instance was that its Petition for Reconsideration acted out a meaningless charade urging correction of an error which, Commission's counsel now states, was never made. Lest it be thought that appellants misunderstanding arose from a failure to perceive that which was plainly stated or clearly implied in the report, it should be noted that in the "work sheet supporting Footnote A)" attached to the Eastern railroads' October 19, 1962, brief it is asserted (Line 7) that the Commission used a factor of 1.78 days car detention at Mt. Vernon.

The Commission's failure to state the rational basis for its ultimate cost conclusion is total and applies to each of the components of the rail cost and even, as will be noted *infra*, to the barge portion of the cost. Thus, that failure, which is the substance of the first question presented on this appeal, pertains to the validity of every component of the total cost found accurate by the Commission, as well as to the total itself. This doesn't mean that the parties were as hopelessly at a loss to make a reasoned determination of how the Commission *probably* reached every restated component cost as they were in the case of origin car detention. It was and is appellants'

position that something more than the probability of reasoned surmise is needed to sustain a Commission report, where the rational basis of its conclusionary findings are concerned.

The Commission argued successfully to the lower court that since the "Commission could have met all legal requirements by accepting *en toto* protestants' figures", it was not obligated to explain any adjustments in such costs which reduced costs and thus, to that extent, operated to appellants' advantage. (See Government brief to District Court, page 30) Commission counsel, with access to all underlying records succeeded, (with a notable exception regarding switching at Brewer Yard dealt with below) in reconciling the "restated" cost with the record. The district court opinion suggests this is all that is necessary to the validity of a challenged cost determination, *i.e.*, that if judicial review is sought, the Commission can, by resort to calculations beyond the report, reconcile the report with the record—even where neither party, with only the record and the face of the report for guidance, can duplicate the reconciliation.

The Eastern Railroads also sought, less successfully, to reconcile the restated costs with the record. In the case of the origin terminal cost at Mt. Vernon, Indiana, the Commission's "restated" costs were $12.4448, while the Eastern railroads, with only the record, could come no closer than $12.4254 (See Appendix to their October 19, 1962 brief "work sheets supporting Footnote (A)", Sheet 1, line 11). This difference was dismissed as "hardly . . . a material variation in result" by the Eastern Railroads who were apparently, at that time, unaware that the decep-

tive closeness of their near reconciliation had partially concealed offsetting errors of greater magnitude.[7]

One of the more significant cost issues presented in the case was whether or not it was appropriate to charge a cost for weighing the cars of coal in the C&EI's Brewer Yard at Danville, Illinois. One of the reasons for the joint barge-rail rate was to eliminate the necessity for weighing the cars. Accordingly, the C&EI's cost witness did not include any cost for switching at Brewer Yard and testified that there would be no weighing at that yard and that the trains carrying the coal would go straight through without any switching at that point. The Eastern railroads contended, notwithstanding the C&EI's testimony, it would be necessary to weigh the coal and they assigned switching costs at Brewer Yard on that basis. The Commission concluded that, while there should be no costs assigned for weighing, nevertheless it would assign some costs for intertrain and intratrain switching at that point. (App. 14). This was, itself, a departure from the evidence inasmuch as the C&EI witness had testified that the trains would not be switched at Brewer Yard, and the testimony of the protestant's witness was based purely upon the theory that the cars would be weighed at that point. No witness for either party had testified that it would be necessary to perform intertrain or intratrain switching if the cars were not weighed at that yard.

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[7] Compare the amount the Eastern Railroads assign to adjusted car detention at Mt. Vernon (Line 7, footnote 8, Sheet 1, $4.5628) with the amount assigned for the same item at Line 7, Sheet 2, Appendix B of the Government brief ($4.6108). The railroads for this item are approximately 5 cents low. On the other hand, just two lines further down on the same page of these appendices, station clerical cost is indicated in the railroad appendix as $.9608 compared with the $.9337 assigned for the same item in the Government brief. Here they would appear to be 3 cents too high.

The Commission then stated that it used a "system average inter-train and intra-train switching cost" of $3.3571 per minute" at Brewer Yard. (App. 14) The highest average intertrain and intratrain switching costs per minute submitted in the record was $.96619, a figure submitted by the protestants. There is no cost figure of $3.3571 per minute anywhere in the record, and the Commission supplied no findings which would explain the basis for this figure.[8]

The barge cost found accurate by the Commission aggregated $1.268, apparently comprised of a 16.1 "dumping" cost at Huntington, West Virginia, a 94.7 cent factor for the line haul barge cost and a transfer cost of 16 cents at Mount Vernon. In contrast to the rail costs, where the Commission accepted neither party's position as to the correct factors, the Commission's findings on barge cost

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[8] Before the district court the attorney for the Commission supplied additional work papers, not included in the Commission's report, showing computations upon which it was alleged that the figure of $3.3571 per minute was based. The Commission's counsel argued that it was not really a cost per minute but that the Commission meant that it was a computed cost based upon other factors in the record. The mathematical explanation provided in these work sheets (Sheet 4, Appendix B of the Commission's brief before the district court) shows that, apart from the basic error of computing a switching cost for a non-existent switching service at Brewer Yard, the calculations necessary to arrive at the figure of $3.3571 required two patently erroneous factors. First, the cost computed was predicated upon the switching costs at Mount Vernon junction, which was predicated upon a 100 percent empty return factor, whereas the protestants had used a factor of 91 percent empty in computing the cost at Brewer Yard. That work sheet also shows that the computation required to attain the $3.3571 figure entailed the increase of the so-called non-variable expense by applying a factor of .86337 minutes against a figure which already included the entire non-variable expenses.

duplicates the assertions of the Eastern Railroads. On that basis, it might appear that, whether or not based on substantial evidence, it is at least clear *what* the Commission did. Even here, however, there is considerable uncertainty as to what the Commission did, and even as to whether it knew what it had done.

In the first place, the Commission did not find the barge cost to be $1.268 but only that it "approximates" that figure (App. 15). The Commission report recites the protestants' estimate of 94.7 cents for the line haul barge cost, then states that "they [protestants] suggest that a more realistic figure would be $1, due to wage and price increases." (App. 14) The record before the Commission does not support the Commission's characterization of the Eastern railroads' position, which was not that the 94.7 cents was an out-dated figure, but merely that other studies made of the costs of other barge lines in other proceedings were even higher. The 94.7-cent figure, in fact, specifically incorporated a 2.9 percent additive which is explained in the Eastern Railroads' cost witness' Exhibit 34 only by the words "wage and price increases since mid-1959." Presumably, although it was never specifically stated in the record or by the Commission in the report, this is simply an application of the same 2.9 percent rail trending factor which had been applied to rail costs to adjust them to 1960 levels. The result of applying this factor is to raise, by 2.7 cents per ton, the barge costs assigned to this movement.

The Commission did not even discuss the appropriateness of applying the 2.9 percent additive to barge costs nor is it apparently even aware of the fact that the figure included such an additive. In argument before the district

court the Commission's counsel contended that the aggregate barge cost figure of $1.268 represented the "Commission's judgment" which resulted after it had "balanced these two factors"—referring to an alleged understatement of the transfer cost and the supposed further need of trending.[9] The magnitude of this factor is apparent when it is considered that this accounted for approximately 3 cents per ton of the total costs which were found to be 5 cents per ton higher than the barge-rail rate.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Most of the competitive rate cases currently decided by the Interstate Commerce Commission turn on the question of whether or not the proposed rates meet the cost for the service entailed. The rule announced in *I.C.C. v. New York, N.H. & H.R. Co.*, ... U.S. ....., 10 L. Ed 2d 108 (1963) makes that question the only test where the protesting carrier fails to show that it has the inherent advantage. Thus, the question of which of conflicting estimates best represent the actual cost involved in the movement studied lies at the very core and substance of the Commission's rate decisions. The Commission's decisions in these rate proceedings determine whether carriers will or will not

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[9] The context of the counsel's argument is as follows at page 46 of the transcript of the argument before the court below:

> From the evidence presented we determined—this is the Commission judgment—that the out-of-pocket cost on the Ohio Company plus the cost of dumping the coal at Huntington and the transfer cost approximates $1.268. In other words, the Commission balanced these two factors. The protestants suggested trending, and also there was this question as to what should be a proper transfer charge, and taking the two into consideration it was the Commission's judgment that a proper figure should be $1.268.

be able to participate in whatever traffic is at stake. In the instant case, the share of this traffic which the C&EI is seeking to maintain is of such magnitude to this carrier, a relatively small railroad as compared with the Eastern railroad defendants, that its loss could well result in the curtailment of its freight service to the public.

The question presented concerning findings is a recurrent one and has pertinency to all the rate decisions issued by the Commission. While the Commission invariably determines costs in proceedings where rates are found noncompensatory, there is no consistency in the extent to which the rational basis for the determination is set forth in the findings in the Commission's report so that the parties may know how the Commission has reached its conclusions. Thus, in one case, the Commission, either by a separate cost appendix attached to and incorporated into its decision, or by a specific section in its report, will extensively discuss the contentions of the parties as to the cost issues and will present its findings as to the resolution of those issues and its rationale therefor. In other decisions, as herein, the Commission will simply recite the cost factors without recognizing the issues drawn by the parties and without indicating its disposition of such issues.

It is apparent from the Commission's rate decisions, as it is also from the position taken by its attorney in the district court below, that the Commission does not or will not recognize its obligation to set forth in its decisions findings which will adequately explain the basis therefor and resolve the material issues presented by the parties. Until such time as this Court shall clearly enunciate to the Commission its obligation to make adequate findings based upon substantial evidence concerning the material cost questions presented in these proceedings, the Commission will con-

tinue to consider its statutory duty to render adequate findings as merely a matter of grace or discretion which it can observe or ignore according to its own caprice. The dangers resulting from such an attitude are apparent. Unless the Commission is compelled to make findings on the material issues raised by the parties concerning costs, its decisions can be grounded upon costs which are arbitrary; founded on matters outside the record; based upon miscalculations or other plain errors; not supported by substantial evidence, or contrary to the evidence of record.[10]

Without such findings, judicial review of the Commission's decision is a meaningless exercise, and the parties have utterly no hope of annulling a Commission's decision which is based upon factors which, had they been expressed in the Commission's report, would have provided grounds for annulling the Commission's decision. As a corollary, if the Commission is not required adequately to state its findings concerning the contested issues presented, there is no inducement to express clearly the grounds for the decision when such findings could only serve as the basis for its ultimate reversal.[11] In the absence of a clearly stated imperative from this Court, it would appear that the decision which would best withstand judicial review is

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[10]Taking the Commission's report together with the factors allegedly underlying that decision as furnished in the brief of the Commission's attorney in the court below, the Commission's decision herein suffers from each of these elements.

[11] It would appear from the argument of the Eastern railroads' counsel before the district court that the Commission has already implemented such a policy in its decision. Their counsel stated:

> Knowing the Commission as we all do, they are prone to make no more of a decision on any point than they have to.

that which eschews findings on the disputed issue of fact presented and merely recites the ultimate conclusory findings.

The Commission's decision herein, as well as its position in the court below, is directly at variance with the statutory requirement of findings imposed upon administrative tribunals by the Administrative Procedure Act. Section 8(b) of that Act (5 U.S.C. §1007) provides without qualification that:

> All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . .

The requirements of that section of the Administrative Procedure Act are fully applicable to the Interstate Commerce Commission. *Atlanta & Saint Andrews Bay Ry. Co.* v. *United States,* 104 F. Supp. 193, 200 (S.D. Ala. 1952)

This appeal squarely presents the question whether the above-quoted statutory mandate is to be observed or avoided. As shown by the Commission's decision and its argument in the court below, the Commission takes the position that it is not required to make findings of fact as to all the material issues, but must only make findings of what it would term "ultimate facts." Thus, responsive to the findings of fact and conclusions of law offered by the Commission's attorney to the court below, that court has made the following conclusion of law:

> The underlying data to support the Commission's findings regarding the cost of operating by plaintiff is based on evidentiary facts in the record as a whole and

> the Commission is only required to set out ultimate and not evidenciary facts supporting its conclusions.

That conclusion means that however deficient may be the findings in the Commission's report, so long as the Commission can produce supplementary data in court which indicates that it did not go outside the record the decision of the Commission must be upheld.

In the instant case, the Commission, through its attorney, brought before the court working papers which seemed to reconcile the Commission's "restated" cost with the record. Thus, in order to show that the findings in its report are adequate, the Commission disclosed in court the factors which it was obligated to set forth in its report in the first instance. Such data, provided *ex post facto* in the context of an action directly attacking the Commission's decision wherein the Commission is committed to support its decision, is no proper substitute for the findings to which the parties are entitled as a matter of right and, under the Administrative Procedure Act, as a matter of law.

It is well settled that administrative action cannot be upheld merely because findings might have been made which would justify the order. *Boudin* v. *Dulles,* 235 F. 2d 532 (D.C. Cir. 1956). Like efforts by attorneys for administrative tribunals to cure defects in the findings of the administrative body through submission of additional data before the court, have been rejected by the court. This is because the attorneys do not speak for the Commissioners who made the decision. The basis for their decision, if any, is that which is set forth in the report. The submission of supplementary data in briefs does not thereby make it a part of the Commission's report. As stated

by the court in *Capital Transit Co.* v. *Public Utilities Commission*, 213 F. 2d 176 (D.C. Cir. 1954):

> In the brief filed by the Commission and the Power Company in the instant case, it is attempted to justify the Commission's ultimate finding by three different computations based in part upon figures included within the discussion summarized and in part upon figures taken from other portions of the record. But these computations appear to be attempted explanations, *post hoc*, of how the Commission *may* have reached the distribution of the $230,000 increase to street railway rates. There is again an absence of findings of basic facts which would, in view of the computations, rationally support the ultimate decision. (p. 193-194)

Failure adequately to state the findings of fact upon which the ultimate findings are based leaves the parties at a loss to understand the basis for the administrative action and to take appropriate action to rectify such a decision where it is not premised upon facts. Thus, in the instant case, these appellants found themselves arguing in a petition for reconsideration before the Commission that certain factors of adjustment offered by their witnesses should have been followed by the Commission, whereas, if the work sheets supplied to the District Court by the Commission's attorney can be used as any guide to the real basis for the Commission's decision, the Commission had actually used one of the factors which appellants assumed it had rejected. Such findings are equally necessary in order for a court to assess whether there is a rational and evidenciary basis for the Commission's action.

It is no help to the reviewing court for counsel and parties intervening on behalf of the Commission to suggest various factors which the Commission allegedly took into consideration, when such factors are not set forth in the

report. In the court below, the Commission's counsel contended that the Commission's costs assigned to switching at Brewer Yard was computed in one manner, while the protestant railroads, intervening in support of the Commission, contended that the Commission had computed it in another fashion.[12] Such data and arguments, provided to the court in the heat of litigation, provide no illumination and are no substitute for findings properly made by the Commission. As stated by Justice Cardozo in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935) at pages 510-511:

> In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U.S. 74, 86; *Florida* v. *United States*, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

Stated differently, the question presented is whether the Commission by failing to specify the factual bases for its

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[12] Also illustrative of the danger of permitting explanation by the Commission's counsel in judicial proceedings to substitute for the findings which should have been made in the report is the argument of its counsel in the court below with respect to the Commission's ultimate conclusion that there was some inter- and intratrain switching performed at the Brewer Yard. The Commission made no findings to support this conclusion and merely referred generally to "the record" as supporting this inference. In argument before the District Court, the Commission's counsel actually contended that the Commission's conclusion on this point was based upon testimony in the record that the trains would stop at Brewer Yard to change crews. If the conclusion was so based the Commission should have said so in order that the parties could have urged correction of what we believe to be an error, and the reviewing court could evaluate the decision in the knowledge of how it was reached.

decision can thereby afford itself the benefit of whatever theories or evidence diligent counsel may present in an effort to uphold the Commission's order on judicial review. Adoption of such a practice would depart from the rule which requires that the grounds for the Commission's decision must be stated in its report. *Missouri Pacific Railroad Company* v. *United States,* 203 F. Supp. 629 (E.D. Mo. 1962). Otherwise, the court is placed in the position of the trier of the facts, attempting to determine whether the bases proffered in court by counsel for the administrative tribunal would justify the conclusions reached. But it is the task of the administrative body, and not the court, to review the evidence and to make the findings upon which its decision is premised. If there is a rational basis for the Commission's decision, then that reasoning must sufficiently appear in its report. *Boston & Maine Railroad* v. *United States,* 202 F. Supp. 830 (D.C. Mass. 1962). As stated in that case, "an order cannot be sustained unless supported by essential basic facts particularly stated" (p. 834).

Insistence that the Commission's report contain the findings of fact upon which its conclusions are based is not an intrusion into the province of the agency. While the function of a court in reviewing an administrative determination is a limited one, that function cannot be fulfilled unless adequate findings are made. The considerations involved were clearly spelled out in *Inland Motor Freight* v. *United States,* 60 F. Supp. 520 (E.D. Wash. 1945):

> An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.'

Opp Cotton Mills, Inc. v. *Administrator*, 312 U.S. 126, 144, 61 S. Ct. 524, 532, 85 L. Ed. 624. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." The findings by the Commission must be specific and definite so as to enable a reviewing court to know from a reading of the findings which facts were used by the Commission as the basis for the conclusions which it reached. *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U.S. 48, 58, 43 S. Ct. 51, 67 L. Ed. 124; *Beaumont, Sour Lake & Western R. Co.* v. *United States*, 282 U.S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221; *State of Florida* v. *United States*, 282 U.S. 194, 214, 51 S. Ct. 119, 75 L. Ed. 291. The findings of the Commission must be at least sufficiently simple and clear as not to leave the Court in the position of being compelled to spell out, to argue and to choose between conflicting inferences. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 510, 55 S. Ct. 462, 79 L. Ed. 1023. The Order of any administrative board or commission must be sufficiently definite to enable the court to determine upon which part of the record the findings are based. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 479-480. 62 S. Ct. 344, 86 L. Ed. 348.

A mere recitation of ultimate conclusory facts does not fulfill the statutory requirement for findings. All material issues of fact presented must be resolved in the report. As stated by Judge Kalodner in the opinion in *In Re United Corporation*, 249 F. 2d 168 (3rd Cir. 1957):

> The final order of an administrative agency must include findings and conclusions upon all material issues presented on the record. The reasons or basis for the decision must also be clearly enunciated. This principle is well established in the law and was expressly codified in Section 8(b) of the Administrative Procedure Act. Judicial interpretation of this requirement is legion. (p. 179)

This court has similarly held that mere ultimate findings are not adequate in *I.C.C.* v. *New York, N. H. & H. R. Co.*, ... U.S. ....., 10 L.Ed. 2d 108 (1963):

> Measured against this standard, the Commission's conclusions cannot be sustained. The Commission did state that the proposed rates were an "initial step" in a program of rate reductions that "can fairly be said to threaten" the existence of the coastwise carriers, but it made no findings, and referred to no supporting evidence, to the effect that these particular TOFC rates would drive the corresponding water carrier rates below a profitable level or otherwise endanger the carriers' survival. Cf. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168; *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130-131.

The requirement of findings is no less appropriate where, as herein, the determinative question before the Commission is one of costs. A suggestion that this is a technical or complicated area in no way justifies a decision which is arbitrary, erroneous, or without the support of substantial evidence in the record. Unless appropriate findings are made, however, there is no way by which the parties can ascertain and point out to the reviewing court the errors hidden behind the conclusions of the Commission. For example, in the instant case, while appellants were urging before the district court that the Commission's findings concerning the barge costs comprehended a clearly erroneous determination on the part of the Commission that such costs should properly be increased by the railroad's wage and price index, the Commission's attorney was arguing generally that the Commission's determination of barge costs were rather based upon other considerations, *viz.*, that the railroads had contended that the barge operating costs might be as high as $1 and that the transfer cost of 16 cents per ton might rise to 25 cents per ton if the coal

volume should drop. Surely findings which permit such divergent arguments as to their underlying basis have failed to state the decisional facts.

In *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433 (D.C. Cir., 1947), the opinion of Judge Prettyman was specifically addressed to the question of the findings necessary in a case where costs were the determining factors in the administrative decision:

> It is also true, and the Supreme Court has held, that judgment and discretion must control in the allocation of costs, because the matter is not an exact science. The discretion which must be exercised is that of the Commission. Congress has confided that function to it. At the same time, Congress has forbidden arbitrary action and has imposed upon the courts a duty of review in that respect. Arbitrary action, if it means anything, means action not based on facts or reason. The discretion and judgment confided in the Commission must be exercised upon facts and for reason. The duty of review imposed upon the courts requires that the facts be found and the reasons stated. Otherwise, the courts cannot determine whether a given action is or is not arbitrary.
>
> The Congressional provisions extend to complicated, difficult matters as well as to simple questions. The courts cannot evade their responsibility merely because the subject matter is obscure. And neither can they be required to probe the minds of the agency for unfound facts or unexpressed reasons. The coordination of the two functions of administrative discretion and judicial review requires that the facts upon which the discretion is exercised, and the reasons, be clearly and completely stated. When the matter is complicated, the necessity is greater. (p. 439)
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> These costs, as we have said, are facts; they are to be ascertained, not merely allowed by grace. (p. 443)

> The Commission says, "The Court, unlike the Commission, is not an expert body * * *." Be that as it may, the Commission, even though expert, is forbidden to be arbitrary. And the courts are directed to prevent it from being so. The Commission cannot, and we do not understand it to claim that it can, shield arbitrariness by averments of its own infallibility, by technical expressions, or by failure to state adequate reasons for its conclusions. (pp. 451-452)

In reviewing the decisions of other administrative agencies, the courts have never considered the technical character of the subject matter as a license for such tribunals to make determinations based upon reports which do not find the facts upon which the decision is based. *Saginaw Broadcasting Co.* v. *Federal C. Com'n.*, 96 F. 2d 554 (D.C. Cir., 1938), cert den. 305 U.S. 613; *State Corp. Commission of Kan.* v. *Federal Power Commission*, 206 F. 2d 690, 722 (8th Cir. 1953), cert. den. 346 U.S. 922, reh. den. 347 U.S. 1022; *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F. 2d 755 (4th Cir. 1957). There is no reason to suspect that the Interstate Commerce Commission is endowed with any greater freedom to issue arbitrary decisions, cloaked behind unexpressed reasons, or that parties before that Commission are entitled to less protection from arbitrary decisions than are litigants before other administrative bodies. Until the Supreme Court speaks authoritatively on the question to the Interstate Commerce Commission, however, parties to Commission rate proceedings will continue to receive only such findings as the Commission, for varying reasons from case to case, sees fit to include in its report as what it considers to be a matter of administrative grace.

Surely, by the standard of the cases cited above, appellants are entitled to know whether or not their contentions seriously urged as sound and in accordance with the evi-

dence, were adopted in whole or in part and, if they were not adopted, to know why they were not adopted and what costs and procedures were accepted in their place. Without the answers to these questions, no intelligent review of the Commission order is possible either before the Commission itself upon reconsideration, or before this Court upon review. As the court well said in *Chesapeake Motor Lines* v. *United States*, 153 F. Supp. 812 (D.Md. 1957):

> When administrative officials merely turn "thumbs up" or "thumbs down" without adequate explanation, little opportunity is left for intelligent review. Two alternatives are then offered the reviewing tribunal if it undertakes a final disposition of the complaint. The first is automatically and uncritically to rubber stamp the administrative action without any effective review; the other is to undertake to search out the matter independently, with the inevitable tendency to substitute judicial for administrative judgment. Both alternatives are undesirable and alien to the traditional scheme, and can be avoided only if administrators make full exposition of the reasons for the actions they take. [Page 815]

The second question presented by this appeal involves the proper application of section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4)) in circumstances never before presented in the series of barge versus rail controversies arising under that section. Heretofore the controversy has stemmed from the refusal of railroads to accord their connecting barge lines participation in joint rates on the same basis as they participate with connecting rail carriers. In this case, one of the River Company's railroad connections "broke ranks" by agreeing to participate in joint barge-rail rates on a basis low enough so that the resulting joint rate attracted some traffic in competition with the paralleling all-rail route. The C&EI

did not, in fact, provide that full equality of treatment which Section 3(4) would require. It negotiated for itself a $2.04 per ton division out of the barge-rail rate while contemporaneously accepting $1.66 per ton out of all-rail rates from the same coal fields to Chicago via a rail junction point adjacent to the barge interchange point.

The joint barge-rail rate resulting from the unprecedented voluntary action of the C&EI is attacked, as noncompensatory, by the railroads which parallel and compete with the River Company in the movement of coal to Chicago. The attacking railroads include the very railroad (the Louisville & Nashville Railroad Company) which interchanges traffic with the C&EI at a division to the C&EI of only $1.66 per ton, for a movement substantially the same as that for which the C&EI receives $2.04 out of the barge-rail rate. The attack is based upon the assertion that the barge-rail rate is noncompensatory, not because of any deficiency in the barge segment of the route (the division for which is conceded to be compensatory) but because of a deficiency in the rail portion thereof.

Thus the attacking railroads argued successfully to the Commission that the competing barge-rail route was unlawful by reason of a deficiency in the rail division thereof, which deficiency was present, to an even greater extent, in the very rail rates it sought to protect by this argument. A carrier may voluntarily accept a division out of a through rate which is not compensatory for the services which it performs thereunder. The question here may be framed thus: Assuming, for the sake of the question discussed, that the higher division accepted by the C&EI from the barge-rail rate is nonetheless noncompensatory to it, can the Commission, consistent with its

obligations under section 3(4) of the Act, strike down a joint rate established in recognition of the carrier's obligations under that section where the only alleged defect is one which is also found, to an even greater extent, in the all-rail rate which is the source of the preference against the barge line? The Commission accepted the argument of the attacking railroad and accordingly condemned the joint rate while leaving undisturbed the existing all-rail rates which are the source of discrimination against the River Company.

The question thus presented is of substantial consequence not only to the River Company and the C&EI, whose participation in this substantial movement hinges upon their ability to name a competitive rate, but also to all water carriers seeking participation in joint rail-water rates on a nondiscriminatory basis and to all railroads who may consider voluntary participation therein where it is in their interest to do so.

This Court is well aware of the difficulty which the barge lines have experienced in enforcing their statutory right to be treated without discrimination as connecting lines by the railroads before the Commission and in the courts in such cases as *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), Aff'd. *per curiam*, *State Corporation of Kansas, et al.*, v. *Arrow Transportation Co., et al.*, 361 U.S. 353 (1960); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). Since here one of the rail carriers has agreed, without coercion by the courts, but nonetheless under an actual statutory obligation under Section 3(4), to enter into a joint barge-rail rate, that rate should not be condemned by the Commission even if the railroads division is non-

compensatory to the rail carrier when judged by conventional Form A standards. But notwithstanding the statutory requirement under Section 3(4) and the mandate of the national transportation policy to coordinate rail and water transportation, the Commission failed to make any findings concerning this issue.

CONCLUSION.

For the reasons stated, it is submitted that the questions presented by this appeal are substantial, that they are of public importance, and that, in its decision, the Court should have the benefit of briefs on the merits and of oral argument.

Respectfully submitted,

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Dated: July 15, 1963.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, a corporation and THE OHIO RIVER COMPANY
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION
62 C 1186

The above action seeks to enjoin, annul and set aside an order of the Interstate Commerce Commission requiring plaintiffs to cancel a joint barge-rail rate of $3.36 per net ton on bituminous coal in minimum lots of 5000 tons moving in interstate commerce from Huntington, West Virginia, via Mount Vernon, Indiana, to Chicago, Illinois.

The court having reviewed the record before the Commission, the pleadings, and the arguments and briefs of the parties, makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Commission report and order cancelling said rate (315 I.C.C. 129) was the subject of two Investigation and Suspension Proceedings, I. & S. 7368 (Barge-Rail Coal From Huntington, West Virginia to Chicago District) and I. & S. 7524 (Coal via Barge-Rail-Huntington, West Virginia to Chicago, Illinois). The evidence in the former was stipulated to control in the latter. In addition, the parties stipulated that the record in I. & S. 7011 (Ex-River Coal Mt. Vernon, Ind. to Chicago District, 308 I.C.C. 87) would be a part of the record in I. & S. 7368.

2. The Commission, Division 2, in its report and order entered November 20, 1961 (315 I.C.C. 129) found that the proposed rates were non-compensatory and therefore unjust and unreasonable, and on May 3, 1962 a petition for reconsideration was denied and compliance with the cancellation order was required.

3. The traffic involved originates at mines in eastern Kentucky and southern West Virginia, and the service to be performed on the joint barge-rail rate includes (1) terminal service at Huntington, consisting primarily of switching cars and dumping coal into barges by ORCO, (2) transportation by barge on the Ohio River from Huntington to Mt. Vernon by ORCO, (3) intermediate terminal service at Mt. Vernon of lifting coal from barges to cars by a private contractor employed by ORCO, and (4) transportation via C & EI from Mt. Vernon to Chicago for interchange to delivering lines.

4. The division of the originally published $3.33 rate allowed ORCO $1.32 for handling from in-cars at Huntington to in-cars at Mt. Vernon and allowed C & EI $2.01 to cover the cost of handling the traffic in rail service from Mt. Vernon to Chicago. After the $3.36 rate became effective, the C & EI division was increased to $2.04 with ORCO continuing to receive $1.32.

5. The Commission previously found that C & EI out-of-pocket cost in November 1958 for handling coal from Mt. Vernon to Chicago was at least $2.15 (I.& S. 7011, 308 I.C.C. 87 and 310 I.C.C. 181).

6. The only change in C & EI handling under the rate in I. & S. 7011 and the rate at issue in I. & S. 7368 was the elimination of weighing of coal cars en route for revenue billing purposes.

7. Although plaintiffs and intervening defendants submitted in evidence a Form A formula analysis of the C & EI cost of operation, the Commission relied on the presentation of intervening defendants since their application of the formula reflected 1959 experience, the most current at the time of the hearing. Rail Form A is a formula developed by the Cost Finding Section of the Commission for use in determining rail freight service costs. The operating factors used in the defendants' study and utilized in the Appendix to the Commission's decision are based on results of special studies made by the C & EI of Mt. Vernon operations during 1958 which were introduced in evidence by that carrier in I. & S. 7011. The basic unit costs reflect the reported operating results of C & EI and the adjustments reflecting physical characteristics of the movement.

8. The Commission utilized the adjustments developed by C & EI in I. & S. 7011 based on 1957 operations and used the following performance factors in developing the characteristics of the traffic in issue: (1) average load per car of 66.7 tons, (2) car tare weight of 22 tons, (3) an empty return ratio of 91%, (4) through train weights of 5,916 tons, (5) destination switching cost of $36.41, and (6) non-compensated freight train car expense based on four days' detention of the car in Chicago.

9. The Commission restated three items of cost utilized by intervening defendants: (1) origin terminal cost at Mt. Vernon, (2) switching at Brewer Yard, and (3) the method of applying a trending factor to reflect the increased costs experienced in wages and prices of material to the time of the hearing.

10. The first restatement of intervening defendants' costs reduced the C & EI car detention at Mt. Vernon from 2.01 to 1.80 car days. This reflected a weighting of the

results of the two studies made by C & EI of the freight car detention at origin. Exhibit 87, I. & S. 7011 showed a detention of 135 cars for 2.01 days and Exhibit 101 showed during a later period of time 765 cars detained an average of 1.44 days. The weighted average detention produced by these two C & EI studies discloses an average car detention of 1.80 days. The origin car detention factor employed by the Commission reflected all of the evidence in the record concerning this characteristic of the movement.

11. The second adjustment in restating defendants' costs accepted the elimination of the cost of weighing at Brewer Yard and that this expense should not be included in the out-of-pocket operating costs. The Commission found that this elimination of weighing costs "does not support the contention of C & EI that the entire intertrain and intratrain switching expenses at that point should be excluded". 315 I.C.C. 132. The evidence shows that the trains would be stopped at Danville, Illinois (Brewer Yard) for crew change; that the 5916 ton weight[1] employed from Mt. Vernon to Chicago substantially exceeded the average daily tonnage[2] of Mt. Vernon traffic

[1] The train weight of 5,916 tons was developed by C & EI in I. & S. 7011 and used by the Commission in arriving at its cost conclusions in that case. Had the C & EI argued for lower average train weight it would have increased the cost of operation for, generally speaking, the greater the tonnage of traffic handled the lower out-of-pocket cost per ton.

[2] Exhibit 11, I. & S. 7368 shows that in the 213 days of 1960 from January through July, the latest information available at the time of the hearing, 734,822 tons of traffic moved via Mt. Vernon. The daily average tonnage during this period was 3,449.86 tons.

to Chicago and would necessitate inter and intratrain switching to pick-up and set-off the additional traffic which would have to be handled if the train were to average 5916 tons. There is substantial evidence in the record to justify a finding that at least one inter or intratrain switch would take place in operation of the trains handling Mt. Vernon coal to Chicago,[3] a distance of 305 miles.

12. The third adjustment in restating costs involved the method of applying the trending factor used to produce costs currently incurred at the time of the 1960 hearing. The Form A study did not include any increases in wages or prices of materials. The Cost Finding Section of the Commission, in its instructions accompanying the Rail Carload Cost Scales by Territories, indicates an approved method of developing this trending factor which was followed by the intervening defendants in preparing their cost study. This trending factor applied in the instant case is the same method which the Commission followed in I. & S. 7011 as to underlying cost items after an allowance for return was excluded. 308 I.C.C. 91, fn 7. An arithmetical application of 2.9% to the expense unit factors affected produces the costs found by the Commission to be applicable to its restatement of costs.

13. The evidence of record relied upon by the Commission concerning C & EI out-of-pocket cost of operation is found in (1) Exhibit 28, an application of 1959 C & EI operating date to the Rail Form A formula which produced unit costs reflecting that year's average operations,

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[3] Even if the Commission was in error, it was not prejudicial error because the outcome would not thereby be changed, since the rate of $3.36 would still be below out-of-pocket cost. Administrative Procedure Act, Rule 10(e); *Watson Bros. Transportation Co.* v. *United States*, 180 F. Supp. 732, 740 (D. C. Neb., 1960).

(2) the performance of factors reflecting the characteristics of the movement developed from special studies of the C & EI introduced in I. & S. 7011, (3) a trending factor developed in accordance with a published Commission formula to produce costs currently incurred at the time of the hearing, and (4) Exhibit 29, intervening defendants' cost study.

14. The Commission properly applied the 2.9% trending factor to ORCO's operating costs from Huntington to Mt. Vernon.

15. There is substantial evidence in the record, considered as a whole, to support the conclusion of the Commission that the out-of-pocket cost incurred by ORCO from in-cars at Huntington to in-cars at Mt. Vernon is, at least, $1.268 and the out-of-pocket cost incurred by C & EI to handle the traffic from Mt. Vernon to Chicago is, at least, $2.1476, producing a through out-of-pocket cost of $3.416. The rate of $3.36 is 5.6¢ per ton below the total out-of-pocket cost of performing the transportation service contemplated by the joint barge-rail rate.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter of the cause. 28 USC §§1336, 1398, 2284 and 2321-2325.

2. The underlying data to support the Commission's findings regarding the cost of operating by plaintiffs is based on evidentiary facts in the record as a whole and the Commission is only required to set out ultimate and not evidentiary facts supporting its conclusions.

3. The order in question was within the statutory power of the Commission, is supported by the findings and conclusions, and is based on substantial evidence in the record as a whole.

Dated: March 25, 1963

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, a corporation and THE OHIO RIVER COMPANY
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

62 C 1186

JUDGMENT

The above entitled cause having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2326 of Title 28, United States Code, and the Court having considered the pleadings, the record before the Commission, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed that the relief prayed for in the complaint be, and it is hereby, denied, and the complaint is dismissed, plaintiffs to pay the costs.

Dated this 25th day of March 1963.

/s *Latham Castle*
Judge, United States Court of Appeals

s/ *Hubert L. Will*
Judge, United States District Court

s/ *Richard B. Austin*
Judge, United States District Court

APPENDIX C

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 7368[1]

BARGE-RAIL COAL FROM HUNTINGTON, W. VA., TO CHICAGO DISTRICT

Decided November 20, 1961

Barge-rail rates on coal from Huntington, W. Va., to points in the Chicago, Ill., district, found unjust and unreasonable. Schedules ordered canceled, and proceedings discontinued.

P. C. Mullen, F. F. Vesper, and *David Sheehy* for respondents.

Arthur M. Stephens and *W. Y. Wildman* for parties supporting respondents.

John W. Hanifin, A. Paul Funkhouser, Louis T. Duerinck, Edward R. Gustafson, Jack Rand, Harry N. Babcock, and *Hewitt Biaett* for protestants.

REPORT OF THE COMMISSION
DIVISION 2, COMMISSIONERS FREAS, GOFF AND HERRING

BY DIVISION 2:

These proceedings are related and will be disposed of in one report. Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in these proceedings. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

[1] This report embraces also I. and S. Docket No. 7524, Coal via Barge-Rail from Huntington, W. Va., to Chicago, Ill., District.

By schedules filed to become effective on June 1, 1960, in the title proceeding, the respondents, the Chicago & Eastern Illinois Railroad Company and The Ohio River Company, sometimes referred to as the Chicago & Eastern Illinois and the Ohio Company, respectively, proposed to establish a joint through barge-rail rate[2] of $3.33 on bituminous fine coal, in minimum lots of 5,000 net tons, consigned as one shipment to one consignee, from in cars at Huntington, W. Va., to in cars at points in the Chicago, Ill., district. Upon protest of certain eastern railroads, the operation of the schedules was suspended until January 1, 1961, when they became effective.

In Investigation and Suspension Docket No. 7524, by schedules filed to become effective on February 2, 1961, the respondents proposed to increase the foregoing rate to $3.36, to conform to the general increases made in the all-rail rates under Ex Parte No. 223. Upon protest of the same railroads, the operation of these schedules was suspended to and including September 1, 1961. The record made in the title proceeding contemplated the 3-cent increase. For convenience, the rate of $3.36 will be referred to as the proposed rate.

The service to be provided on this traffic includes: (1) terminal service at Huntington consisting primarily of switching cars and dumping coal into barges by the Ohio Company; (2) transportation by barge on the Ohio River from Huntington to Mount Vernon, Ind., by the Ohio Company; (3) terminal service at Mount Vernon involving movement of coal from barges to cars by a private contractor employed by the Ohio Company; and (4) transpor-

[2] Rates and costs are stated per net ton, unless otherwise indicated.

tation by rail in multiple-car lots from Mount Vernon to destinations in the Chicago district by the Chicago & Eastern Illinois and connecting switching lines.

This traffic originates at mines in eastern Kentucky and West Virginia, and moves to steel mills in the Chicago area by either of three ways; namely, all-rail, rail-lake, or rail-barge-rail. In the past no joint rates on this traffic have been maintained as between the rail and water carriers, and this Commission has had no jurisdiction over the charges made for the water portion of the movement or the terminal charges in connection therewith. See sections 1(1)(a) and 303(b) of the act.

Effective April 6, 1953, the Chicago & Eastern Illinois established an ex-river rate of $1.89 from Mount Vernon to Chicago, which, with the rail rate from the mines to the river and the barge and transfer charges, permitted rail-barge-rail shipments to be made at total charges less than those applicable over the all-rail routes. In a report on reconsideration in *Ex-River Coal from Mount Vernon, Ind., to Chicago,* 296 I.C.C. 489, division 2 in effect, approved that rate, subject among other things, to a minimum of not less than 2,000 net tons. That rate, because of authorized general increases, was subsequently increased to $2.08. By schedules filed to become effective on September 8, 1958, the Chicago & Eastern Illinois proposed to reduce this rate to $1.89. In *Ex-River Coal, Mount Vernon, Ind., to Chicago District,* 308 I.C.C. 87 and 310 I.C.C. 181, hereinafter called the *Ex-River Coal* case, the Commission found that the rate of $1.89 was not compensatory, and thus was not shown to be just and reasonable. The parties have stipulated that the record in the *Ex-River Coal* case be made a part of the record in these proceedings.

The Chicago & Eastern Illinois admits that the proposed rate would supplant its present ex-river rate of $2.08 from Mount Vernon to Chicago, and that it would receive therefrom a division of $2.04. In the *Ex-River Coal* case the Commission found, in 310 I.C.C. at page 186, that the cost of the Chicago & Eastern Illinois on this traffic was $2.045 at the wage and price levels for the year 1957, and that with subsequent increases in wages and prices the restated weighted-average out-of-pocket cost of this service would have become $2.15.

Both the respondents and the protestants submitted cost studies reflecting the application of Rail Form A, a formula for use in determining rail freight-service costs prepared by our cost finding section. An itemized statement and explanation of the cost data are contained in the appendix to this report. The Chicago & Eastern Illinois obtained its out-of-pocket costs based on its 1957 operations, as applied in the *Ex-River Coal* case. Based on special studies introduced in this case, certain adjustments previously used were again made to reduce the system average costs. No adjustment for wage and price changes since 1957 was used in restating the costs for a later period. Costs were computed for an average load per car of 66.7 tons, using a tare weight of 22 tons per car, and an empty return ratio of 91 percent. The costs are for through trains weighing 5,916 tons. The weighing of the cars at Brewer Yard, Danville, Ill., and any intertrain or intratrain switching at that point were not included in the Chicago & Eastern Illinois' costs. That road does not terminate any of this traffic at destinations local to its lines. In each instance an interchange cost is incurred. For example, the destination switching cost for the average car terminated by the Indiana Harbor Belt Railroad Company (Indiana Harbor

Belt) is $36.41. This cost is determined by multiplying 66.7 tons by the per-ton switching charge of 54.6 cents. The line-haul costs were premised upon the Chicago & Eastern Illinois' system average ratio of empty to loaded car-miles of 91 percent. As the appendix shows, the Chicago & Eastern Illinois computed its total out-of-pocket costs per net ton of this traffic as $1.93.

The rail costs as computed by the protestants reflect the data in the Chicago & Eastern Illinois' 1959 annual report. In computing the out-of-pocket terminal costs at Mount Vernon, the protestants used the special-study data accepted in the *Ex-River Coal* case, and reduced the switching and car-day expenses to reflect the conditions occurring during a test period in December 1958. They also included intertrain and intratrain switching on a per-car basis at Mount Vernon Junction, Ind., and at Brewer Yard. Line-haul costs were determined for a through train of 5,916 tons, for a car with a tare weight of 22.53 tons, and included an empty return of the hopper cars of 91 percent. A final item of cost for noncompensated freight-train car expense based on 4 days' detention of the car in Chicago was included. The Chicago & Eastern Illinois determined the car detention to be 2.67 days from an analysis of 765 owned cars during March 1958. The protestants used 4 days, as accepted by the Commission in the *Ex-River Coal* case, and also introduced evidence showing that 1,030 cars were detained an average of 7.93 days by the Indiana Harbor Belt and The Pennsylvania Railroad Company. The interchange records of these two railroads for the period of December 3 to 17, 1958, were examined to determine 7.93 days. Thus, the use of the 4-day detention period appears conservative. The protestants arrived at a total out-of-pocket cost of $144.36 per car, and a weighted-average cost of $2.183 per ton.

As shown in the appendix, the restatement of these costs reflects the 1959 annual-report data of the Chicago & Eastern Illinois. We have adjusted the operating expenses, rents, and taxes (other than Federal income) by 2.9 percent for wage and price increases to July 1, 1960. We have used 4 days' detention of cars at Chicago. The elimination of the cost of weighing at Brewer Yard does not support the contention of the Chicago & Eastern Illinois that the entire intertrain and intratrain switching expenses at that point should be excluded. System average intertrain and intratrain switching costs are computed at $3.3571 per minute. The record shows that at Brewer Yard the switching, exclusive of weighing, requires 0.83788 minute per car, reflecting a cost of $2.8128 per car. In the *Ex-River Coal* case this cost was stated as $2.716. On this basis the weighted-average out-of-pocket cost of $2.1476 a ton exceeds $2.04, the amount that the Chicago & Eastern Illinois would receive as its division for moving this traffic. It follows that the revenue from the proposed rate would not yield out-of-pocket cost on the Chicago & Eastern Illinois.

The Ohio Company would receive a division of $1.32 under the proposed rate of $3.36. This respondent computes its fully distributed cost as $1.267, reflecting a "profit" of 5.3 cents, which it characterizes as "very slim." These results are not supported by underlying data and thus may be accorded little weight. The protestants compute an out-of-pocket line-haul barge cost of 94.7 cents. They suggest that a more realistic figure would be $1, due to wage and price increases. The cost of dumping coal at Huntington is shown as 16.1 cents, with a transfer cost of 16 cents at Mount Vernon, reflecting a total of $1.268, as computed by the protestants. The Ohio

Company testified that it had an oral agreement with a contractor that the transfer cost would be 16 cents. However, the record indicates that this cost would be more if the traffic should fall below 55,000 tons in a single month. In the *Ex-River Coal* case it appeared that the Mount Vernon charge was 25 cents a ton as performed by an independent contractor, the dumping charge at Huntington was 25 cents, and the barge line-haul cost was shown as $1.

From the evidence presented, we determine that the out-of-pocket cost on the Ohio Company, plus the cost of dumping the coal at Huntington and the transfer cost at Mount Vernon approximates $1.268, which added to the cost of $2.1476 on the Chicago & Eastern Illinois produces a through out-of-pocket cost of $3.416, or substantially in excess of the proposed rate. It is thus apparent that the rate as proposed is not compensatory. There is no need to decide the issue regarding the burden of proof.

We find that the proposed schedules are unjust and unreasonable. An order will be entered requiring their cancellation, and discontinuing the proceedings.

COMMISSIONER HERRING, concurring in part:

In dissenting from the majority opinion in *Ex-River Coal from Mount Vernon, Ind., to Chicago District, supra,* I was not convinced (1) that the use of the ratio of 91 percent of empty to loaded car-miles in computation of respondent's out-of-pocket costs was the proper figure or (2) that car-detention time of 4 days, in comparison with the Chicago & Eastern Illinois system average of 3.75 days, reflected actual conditions more objectively. However, in the instant proceeding respondent has predicated its costs, *inter alia,* on an empty return ratio of 91 percent.

APPENDIX

Comparison of out-of-pocket costs of handling coal from Mount Vernon, Ind., to Chicago, Ill., as computed by the Chicago & Eastern Illinois, and as restated

Item	Chicago & Eastern Illinois[1]	Restated[2]
Origin terminal cost at Mount Vernon	$10.0047	$12.4448
Line-haul cost, Mount Vernon to Chicago, 285.1 miles:		
Net ton-mile cost	31.2169	31.0002
Car-mile cost	34.8843	37.2138
Switching cost at Mount Vernon Junction	2.3769	2.8984
Switching cost at Brewer Yard	0	[3] 2.8128
Interchange cost at Chicago	8.3367	9.7654
Switching absorption at Chicago	36.4182	36.4182
Noncompensated freight-car expense at Chicago	[4] 5.0022	[4] 10.0655
Total cost per carload	128.2399	142.6191
Total cost per ton, Indiana Harbor Belt termination	1.923	2.1382
Line-haul cost, Yard Center to Chicago:		
Net ton mile cost	1.0987	1.1145
Car-mile cost	1.2393	1.4010
Total cost per carload	130.5779	145.1346
Total cost per ton, Pennsylvania Railroad termination	1.958	2.1759
Weighted-average cost per ton[5]	1.932	2.1476

[1] The Chicago & Eastern Illinois' costs and those restated include a weight of 66.7 tons per car, and an empty return ratio of 91 percent. The Chicago & Eastern Illinois' costs are based upon application of Rail Form A to 1957 operating expenses. Special study data from the report of the Commission in the *Ex-River Coal* case have been further adjusted.

[2] Costs were obtained from the protestants' Rail Form A application to the 1959 annual report data of the Chicago & Eastern Illinois, with an adjustment of 2.9 percent for wage and price increases to July 1, 1960.

[3] While we have eliminated the cost of weighing at this point, we have included intertrain and intratrain switching costs.

[4] The Chicago & Eastern Illinois used 2.67 days' detention at Chicago. However, the record fully supports the use of 4 days' detention at Chicago. On such a basis the restated cost would total $10.0655.

[5] Weighted-average cost based upon 25 percent tonnage to The Pennsylvania Railroad Company and 75 percent to the Indiana Harbor Belt Railroad Company.

APPENDIX D.

ORDER

At a Session of the INTERSTATE COMERCE COMMISSION, Division 2, held at its office in Washington, D. C. on the 20th day of November, A. D. 1961.

INVESTIGATION AND SUSPENSION DOCKET NO. 7368

BARGE-RAIL COAL FROM HUNTINGTON, W. VA., TO CHICAGO DISTRICT

INVESTIGATION AND SUSPENSION DOCKET NO. 7524

COAL VIA BARGE-RAIL—HUNTINGTON, W. VA., TO CHICAGO, ILL. DISTRICT

It appearing, That in I. & S. No. 7368, by order dated May 26, 1960, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said order, and suspended the operation of the schedules to and including December 31, 1960, after which they became effective;

It further appearing, That in I. & S. No. 7524, by order dated January 30, 1961, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said order, and suspended the operation of the schedules to and including September 1, 1961;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that said division, on the date hereof, has made

and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the said schedules, on or before December 28, 1961, upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and that these proceedings be, and they are hereby, discontinued.

By the Commission, division 2.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX E.

SERVICE DATE
MAY 9, 1962

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 3rd day of May, A.D. 1962.

INVESTIGATION AND SUSPENSION DOCKET NO. 7368

BARGE-RAIL COAL FROM HUNTINGTON, W. VA., TO CHICAGO DISTRICT

INVESTIGATION AND SUSPENSION DOCKET NO. 7524

COAL VIA BARGE-RAIL—HUNTINGTON, W. VA., TO CHICAGO, ILL. DISTRICT

Upon consideration of the record in the above-entitled proceedings, petition, filed February 5, 1962, of respondents for reconsideration of the report and order of Division 2, decided November 20, 1961, and for oral argument, and reply thereto by protestants, certain railroads in eastern territory, filed March 19, 1962;

It is ordered, That the petition be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant reopening of these proceedings for reconsideration or for oral argument;

It is further ordered, That the order entered in this proceeding on November 20, 1961, which order pursuant to Section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petition be, and it is hereby, reinstated and modified so as to become effective on June 18, 1962, without change in the requirements of said order.

By the Commission, Division 2, acting as an Appellate Division.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX F.

INTERSTATE COMMERCE ACT, 24 Stat. 379, as amended [49 U.S.C. § 1 *et seq.*]:

National Transportation Policy [49 U.S.C. preceding § 1]:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(5) [49 U.S.C. § 1(5)]:

> (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(4) [49 U.S.C. § 3(4)]:

> (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the in-

terchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 14(1) [49 U.S.C. § 14(1)]:

(1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Administrative Procedure Act, §8(b) [5 U.S.C. §1007 (b)]:

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. June 11, 1946, c. 324, § 8, 60 Stat. 242.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 275

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND THE OHIO RIVER COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission. The Commission's order[1] required the

[1] The Commission's report and order, 315 I.C.C. 129, embraced two Investigation and Suspension proceedings, I. & S. 7368,

appellants to cancel a joint barge-rail rate of $3.36 per net ton, in minimum lots of 5,000 net tons, for the movement of bituminous coal from Huntington, West Virginia, via Mount Vernon, Indiana, to the Chicago, Illinois district, because the rate was non-compensatory, and therefore, unjust and unreasonable under Section 1(5) of the Interstate Commerce Act.

The traffic here involved originates at mines in eastern Kentucky and southern West Virginia, and the service to be performed under the joint barge-rail rate includes (1) terminal service at Huntington, W. Va. (switching cars and dumping coal into barges) by the Ohio River Company (River Company); (2) transportation by barge on the Ohio River from Huntington to Mount Vernon, Indiana, by the River Company; (3) intermediate terminal service at Mount Vernon (lifting coal from barges to cars) by a private contractor employed by the River Company; and (4) transportation via the Chicago & Eastern Illinois Railroad Company (C&EI) from Mount Vernon to the Chicago district for interchange to delivering lines (App. 2, 11).

The cost of the C&EI rail movement from Mount Vernon to Chicago has been the subject of two prior Commission proceedings. In *Ex-River Coal from Mount Vernon, Ind., to Chicago*, 296 I.C.C. 489 (1955), the Commission (Division 2) indicated approval of a 1953 ex-river rate of $1.89, subject, among other

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Barge-Rail Coal from Huntington, West Virginia to Chicago District, and I. & S. 7524, *Coal via Barge-Rail-Huntington, West Virginia to Chicago, Illinois.*

things, to a minimum of not less than 2,000 net tons. Because of authorized general railroad increases, this rate was subsequently increased to $2.08 (J.S. 7). The C&EI's proposal to lower the rate to $1.89 was denied by the Commission in *Ex-River Coal, Mount Vernon, Ind., to Chicago District,* 308 I.C.C. 87 (1959), and 310 I.C.C. 181 (1960) (referred to herein as I. & S. 7011). The Commission found that the cost of this movement *in 1957* was $2.045, but at wage and price levels for *November, 1958,* the out-of-pocket cost would be $2.15 (308 I.C.C. 90-91; 310 I.C.C. 186).[2] The parties stipulated that the record in I. & S. 7011 would be made a part of the record in the present proceeding (App. 1, 11).

Although the Commission had found that the C&EI's costs as of November, 1958, would be at least $2.15, the C&EI published a joint rate of $3.36 with the River Company under which the C&EI would receive a division of $2.04 (App. 2, 12). The only difference in the C&EI's handling of the traffic under the ex-river rate ordered cancelled in I. & S. 7011,

[2] Appellants assert that the Commission in I. & S. 7011 found the out-of-pocket costs to be $2.045 (J.S. 7). This disregards the Commission's finding that the C&EI's out-of-pocket costs as of November 1958 for handling coal from Mount Vernon to Chicago was at least $2.15 (App. 12), and the confirmation of such finding by the district court (App. 2). This C&EI proportional ex river rate became $2.11 upon application of the increase authorized in *Ex Parte* 223 and the reasonableness of this rate, which remained in effect after cancellation of the $1.89 rate, is under consideration in *Baltimore & Ohio Railroad Company, et al.* v. *Chicago and Eastern Illinois Railroad Company, et al.*, Docket No. 33706.

and the joint barge-rail rate here at issue, is that the coal cars are not weighed en route for revenue billing purposes (App. 2).

The evidence before the Commission in the present proceeding as to the C&EI's cost of operation consisted of conflicting Rail Form A [3] analysis of the C&EI's costs submitted by appellants and by protestant railroads. The Commission relied on the presentation of the protestant railroads because their application of the formula reflected 1959 experience, the most current at the time of the hearing (App. 3). However, in determining the C&EI's costs, the Commission utilized the adjustments developed by the C&EI in I. & S. 7011, and basic unit costs reflecting physical characteristics of the movement [4] (App. 3). The Commission restated three items of cost utilized by the protestant railroads: (1) origin terminal cost at Mount Vernon; (2) switching cost at Brewer Yard; and (3) the method of applying a trending factor to reflect increased costs experienced in wages and prices of material to the time of hearing (App. 3). In each instance the result of the Commission's restatement of protestant railroads' figures was to produce a lower out-of-pocket cost.

[3] Rail Form A is a formula developed by the Cost Finding Section of the Commission for use in determining rail freight service costs.

[4] The Commission used the following performance factors in developing the characteristics of the traffic at issue: (1) average load per car of 66.7 tons; (2) car tare weight of 22 tons; (3) an empty return ratio of 91 percent; (4) through train weights of 5,916 tons; (5) destination switching cost of $36.41; and (6) four days' detention of the car in Chicago (App. 3).

Both appellants and protestant railroads also submitted conflicting cost figures for the River Company's portion of the movement. The Commission relied on the evidence submitted by the protestant railroads inasmuch as the River Company did not submit underlying data to support its computations (App. 14). The Commission found that the out-of-pocket expense incurred by the River Company from in-cars at Huntington to in-cars at Mount Vernon approximates $1.268, including (1) an out-of-pocket line-haul barge cost of 94.7¢; (2) a dumping charge at Huntington of 16.1¢; and (3) a transfer cost at Mount Vernon of 16¢[5] (App. 6, 14–15).

In setting forth its findings as to the C&EI's out-of-pocket costs the Commission in the body of its report (App. 11–14) discussed the conflicting contentions of the parties, and compared the evidence submitted in this proceeding with the evidence incorporated in the record from the I. & S. 7011 proceeding. In the Appendix to its report in this proceeding, the Commission broke down the rail service involved into ten underlying service units, comparing as to each the out-of-pocket cost as computed by the C&EI with the Commission's findings as to these costs (App. 16, the column designated as "restated"). This breakdown of the C&EI's costs in an appendix is similar in form to the method employed by the Commission in its report in the prior I. & S. 7011 proceeding (310 I.C.C. at 187).

[5] The Commission noted that in I. & S. 7011 it appeared that the Mount Vernon charge was 25 cents a ton as performed by an independent contractor, the dumping charge at Huntington

The three-judge district court found that the Commission's findings were supported by substantial evidence of record (App. 1–6).[6] The court found ample support in the record for the Commission's conclusion that the out-of-pocket cost incurred by the River Company from in-cars at Huntington to in-cars at Mount Vernon is, at least, $1.268, and the out-of-pocket cost

was 25 cents, and the barge line-haul cost was shown as $1—a total costs of $1.50 (App. 15). The Commission pointed out that the 16¢ cost figure for transfer at Mount Vernon presented by appellants would be subject to increase if the traffic should fall below 55,000 tons in a single month (App. 15). Appellants contend (J.S. 18–19) that the Commission improperly applied a 2.9 percent trending factor to the River Company's operating costs from Huntington to Mount Vernon. The Commission, in the case of the River Company's costs, accepted the evidence of the protestant railroads, and no evidence is cited in the record to show that the 2.9 percent trending factor was incorrectly developed or applied.

[6] The trial court's findings of fact recite in detail the evidence supporting each of three restated items of cost (App. 3–6). For example, as to the cost figure for switching at Brewer Yard, to which appellants take particular exception (J.S. 16–17), the lower court quoted the Commission's finding (App. 4), and pointed out the evidence in support of the finding: (1) trains would be stopped at Brewer Yard for crew change; (2) the 5,916 ton train weight employed by the C&EI in support of its argument that there would be no switching substantially exceeded the daily average tonnage moving from Mount Vernon to Chicago (daily average tonnage during the 213 days of 1960 from January through July was 3,449.86 tons); and (3) to attain an average train weight of 5,916 tons inter and intratrain switching would be necessary to pick-up and set-off the additional traffic (App. 4–5). The trial court found that there is substantial evidence in the record to justify a finding that at least one inter or intratrain switch would take place in the 305 mile distance between Mount Vernon and Chicago (App. 5). Moreover, the lower court noted that even if the Commission had erred, it was not prejudicial error, since the rate would still be below out-of-pocket cost (App. 5).

incurred by the C&EI to handle the rail movement from Mount Vernon to Chicago is, at least, $2.1476, producing a through out-of-pocket cost of $3.416 (App. 6). The rate of $3.36 was thus 5.6¢ per ton below the out-of-pocket cost of performing the barge-rail movement here at issue.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellants argue (J.S. 19–31) that the Commission's report fails to contain detailed findings of fact supporting its conclusion that the rate at issue is non-compensatory. Although the Commission in its report and attached appendix broke down the out-of-pocket costs into the underlying service units involved, comparing findings as to these units with the Commission's findings in the prior I. & S. 7011 proceeding, and with the cost figures submitted by appellants in the present proceeding (App. 11–16),[7] appellants urge that the Commission's findings are deficient because

[7] The care with which the Commission scrutinized the evidence is shown by its determination of the proper car-detention time at Chicago. The Commission pointed out that the C&EI determined the car-detention to be 2.67 days from an analysis of 765 owned cars during March, 1958 (App. 13). The protestants argued that 4 days should be used, as accepted by the Commission in I. & S. 7011 (App. 13). The Commission noted that protestants had introduced evidence showing that 1,030 cars were detained an average of 7.93 days based on interchange records (App. 12a). The Commission found that 4-days car-detention at Chicago was supported by the record (App. 13, 14, 16), and on that basis the non-compensated freight-car expense at Chicago would total $10.0655, rather than $5.0022 as the C&EI contended (App. 16).

it failed to explain exactly how certain cost figures were derived, in particular the switching cost at Brewer Yard (J.S. 25) and the River Company's costs (J.S. 28).

The court below, after a careful review of the evidence, entered findings of fact as to the restated costs challenged by appellants[8] (App. 1–6), and concluded that the order of the Commission is supported by findings based upon substantial evidence in the record (App. 7). There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States,* 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491; *United States v. Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536.

Appellants suggest that it was error for the court to conclude that the Commission "is only required to set out ultimate and not evidentiary facts supporting its conclusions." (J.S. 22; App. 6.) In the context of the present case, where the Commission has entered findings on the various underlying service units comprising the out-of-pocket cost of the movement in sufficient detail to disclose the basis of its judgment, the trial court's statement is plainly correct. The Commission has never been required to detail every calculation or computation underlying its conclusion. It is sufficient, as this Court has recently had

[8] The district court found that the Commission had properly determined each of the underlying cost figures, including the three restated costs, and the River Company's costs, pointing out the evidence in support of the findings of the Commission (App. 3–6).

occasion to reiterate, for the Commission to set forth its conclusions and reasons on the material issues of fact, law or discretion presented on the record. Section 8(b) of the Administrative Procedure Act, 60 Stat. 237, 242, 5 U.S.C. § 1007(b); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167–168 (1962). Appellants' argument (which in substantial part restates its argument in the district court, J.S. 13, 14) largely ignores the district court's analysis of the Commission's findings, which fully demonstrates the sufficiency of the report. See *Minneapolis & St. Louis Ry.* v. *United States,* 361 U.S. 173, 192–94; *Alabama G. S. Ry.* v. *United States,* 340 U.S. 216, 227–28; *United States* v. *Pierce Auto Freight Lines, supra,* at 531–32.

2. Appellants argue that, even assuming the joint barge-rail rate is non-compensatory, the unlawful rate must, under Section 3(4), be approved by the Commission because the C&EI's division of the barge-rail rate through the Mount Vernon Gateway is greater than the C&EI's division under an all-rail rate with the Louisville and Nashville Railroad Company through the Evansville Gateway (J.S. 32–33).

Appellants thus seek to raise in this Court issues which they did not raise before the Commission in their petition for reconsideration nor in their complaint or opening brief in the court below. Although the Section 3(4) issue was mentioned in their reply brief and in oral argument, appellants failed to request the lower court to rule on the matter in submitting their proposed findings of fact and conclusions of law, and the district court properly declined

to do so. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37. The issue was not preserved for review in this Court. *United States* v. *Baltimore & O. R. Co.*, 231 U.S. 274, 297; *Dayton Goose Creek R. Co.* v. *United States*, 263 U.S. 456, 487; *Pennsylvania R. Co.* v. *Public Utilities Commission*, 298 U.S. 170, 177.

Furthermore, appellants' belated suggestion of these Section 3(4) issues is not supported by evidence of record in this proceeding. Appellants offered no evidence to show that the L&N–C&EI movement over the Evansville Gateway is a substantially similar service at a competitive all-rail rate to the C&EI-River Company movement through the Mount Vernon Gateway with respect to this same coal traffic (J.S. 32). Certainly, the Commission is not divested of its power to order cancellation of a non-compensatory rate under Section 1(5) by the fact that the C&EI had accepted a lower division over another all-rail route, particularly where the only carrier whose rate divisions are asserted to be discriminatory are those of the C&EI. If the C&EI is dissatisfied with its lower rate divisions over the all-rail L&N route, or the River Company considers itself subject to discrimination by rail carriers, the remedy is to file a complaint with the Commission seeking relief. The issues which might be involved in such a proceeding were not presented for decision in this case.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

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No. 275

In the

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October Term, 1963

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND THE OHIO RIVER COMPANY,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Erie-Lackawanna Railroad Company; Louisville and Nashville Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; and The Pennsylvania Railroad Company, protestants in the proceedings before the Interstate Commerce Commission and intervenors-as-defendants in the Court proceeding below, move that the judgment of the District Court be affirmed.

STATEMENT

A statement of the basis for the Interstate Commerce Commission decision, about which the appellants have complained, affords patent confirmation that nothing substantial has been presented here. In sum, it is: Based on identifiable evidence in the record before the Commission, the only conclusion which can be reached is that the joint barge-rail rates[1] published by The Ohio River Company and Chicago & Eastern Illinois Railroad Company are below the carriers' out-of-pocket cost of performing the service. A non-compensatory rate being unjust and unreasonable, it was accordingly found that the rates under investigation were unlawful and, therefore, they were ordered cancelled.

While other evidence of unlawfulness was presented, the Commission rested its findings solely on this basic issue for, unless a publishing carrier can show its proposed rate to be compensatory, there is no need to consider if it conforms to the other pertinent sections of the Interstate Commerce Act. Ascertainment of this initial question necessarily involves a routine but highly technical question of cost analysis.

The coal traffic originates at mines in eastern Kentucky and southern West Virginia, and the services to be performed on the joint barge-rail rate include: (1) terminal service at Huntington, consisting mainly of switching cars and dump-

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[1] There were two rates under investigation. The first was a joint barge-rail rate of $3.33 which was published to become effective June 1, 1960, but was suspended and investigated in *Barge-Rail Coal, Huntington, W. Va., to Chicago District*, I. & S. 7368, 315 I. C. C. 129. The second was a subsequent republication of the same joint barge-rail rate to include the three-cent increase allowed by the Interstate Commerce Commission in *Increased Rates on Coal and Petroleum Coke*, Ex Parte 223 (Sub-No. 5), 316 I. C. C. 159. The increased rate of $3.36, which was published to become effective on February 2, 1961, was suspended and investigated under *Coal via Barge-Rail from Huntington, W. Va., to Chicago, Ill., District*, I. & S. 7524, 315 I. C. C. 129.

ing coal into barges by Ohio River Company; (2) transportation by barge on the Ohio River from Huntington to Mt. Vernon by Ohio River Company; (3) intermediate terminal service at Mt. Vernon of lifting coal from barges to cars by a private contractor employed by Ohio River Company; and (4) rail transportation from Mt. Vernon to Chicago with the traffic interchanged to delivering lines who serve the receivers.

The cost of each of these services was developed in the record, all of which required a detailed consideration of the operation involved and then a development of the attendant costs that would be incurred in performing the service. Although the burden assigned by statute to show the changed rate to be just, reasonable and otherwise lawful was on the publishing carriers, they disclaimed this obligation. The Commission, nevertheless, found that the protestant eastern lines had affirmatively shown the higher of the two rates under investigation, $3.36, was 5.6 cents below the total out-of-pocket cost of performing the transportation service contemplated by the joint barge-rail rates. Because the administrative report concluded that the division of revenue received by Ohio River Company was slightly higher than the out-of-pocket cost of performing the barge service, the main issue on appeal involved the costs incurred by Chicago & Eastern Illinois.

The Commission, in developing the cost of operation over the Mt. Vernon route, did not rely on the operating cost analysis presented by the C&EI but, instead, used as a basis for its conclusions the cost presentation of the eastern lines. The reason for this was manifest. The C&EI based its cost evidence on 1957 operations while the eastern railroads used 1959 figures, which were the latest available at the time of the hearing. The evident motivation of C&EI in using 1957

figures was to avoid the impact of increased operating expenses which it had incurred in the interim between 1957 and the date of hearing in 1960, which, if ignored, would have artificially reduced the railroad's operating cost experience. Even the C&EI cost witness at the hearing admitted that 1959 unit expenses were more realistic than the figures he had used (*Barge-Rail Coal, Huntington, W. Va., to Chicago District*, I. & S. 7368, *supra*, R. 258).

The eastern lines applied the 1959 operating results to the Commission-developed Rail Form A[2] cost formula which it has said, in direct and unequivocal language, should be used to measure the compensativeness of a rate. In *Iron or Steel Articles from the East to the Southwest*, 310 I. C. C. 587, 594, it was said:

> "The railroads have a ready means of determining their costs on particular traffic: namely, the use of Rail

[2] The basic formula used was Rail Form A entitled *Formula for Use in Determining Rail Freight Service Costs*. This formula uses the expenses and statistics for a given year as reported to the Commission by the carriers and supplemental data derived from special studies made by the carriers. The starting point is the freight expenses and statistics which are derived in accordance with the rules prescribed by the Commission for the separation of expenses, rents, and taxes between the freight and passenger services. The freight expenses are inserted in Rail Form A and assigned or apportioned to services, such as running service (line-haul), yard and train switching services, station service, special services, and general overheads. The general overheads are later apportioned to the other services. The aggregate expenses for each service are then divided by appropriate service units to derive unit costs. The allowance for return is based upon depreciated original cost, present value of land and rights, and an allowance for working capital. These net figures are also separated between those applicable to freight service and those applicable to passenger service. The allowance for return is increased for a computed Federal income tax based upon the rate of return used for a particular study. The computed Federal income tax gives consideration to the rate of return used in the study and the amount of fixed charges of the carriers under study.

> Form A, a cost formula developed by our cost finding section, or of other recognized cost formulas. Such cost formulas should be employed in establishing the compensativeness of rates in issue."

The 1959 operating data used in connection with the Form A formula study were obtained from the Annual Report of C&EI to the Commission. After C&EI unit costs were ascertained by use of the formula, they were applied to reflect the operating experience factors which C&EI had developed by special studies, previously made, of the Mt. Vernon to Chicago operation. These operating experience factors had been introduced in evidence by C&EI in *Ex-River Coal, Mt. Vernon, Ind., to Chicago District*, I. & S. 7011, 308 I. C. C. 87; 310 I. C. C. 181. While the eastern lines considered these experience factors to understate the actual cost of handling the traffic, for they were developed during a period of peak business which tended to reduce the measuring cost units, nevertheless, they satisfied the purpose at hand because, even with C&EI's own studies, the joint rates could be shown to be below out-of-pocket cost. And, it is pertinent to note, as the Commission's report points out at page 130, the parties stipulated that the record in *Ex-River Coal, Mt. Vernon, Ind., to Chicago District*, I. & S. 7011, *supra*, would be made a part of the record in *Barge-Rail Coal, Huntington, W. Va., to Chicago District*, I. & S. 7368, *supra*. Thus, the operating experience factors used were not only those developed by C&EI from special studies which it had made of the Mt. Vernon to Chicago operation, but, also, they were part of the record before the Commission.

In effect, the Commission's decision is based on evidence which reflected:

(1) data reported by the C&EI to the Commission, which were

(2) utilized in preparing a Form A formula study, that was

(3) modified to reflect the results of studies made by C&EI of the Mt. Vernon to Chicago operation in *Ex-River Coal, Mt. Vernon, Ind., to Chicago District*, I. & S. 7011, *supra*, which were part of the record before the Commission, and

(4) the adjustments used in the Commission's restatement did not include certain operating expenses, weighing and clerical, which the C&EI argued would be unnecessary after publication of the joint rates.

The essence of the appellants' approach seems to be the Commission's report is derelict in not affording an adequate and lucid explanation of how it arrived at its conclusion that the rates were below the out-of-pocket cost of handling the traffic. Since the report clearly states that, except for three items, the eastern lines' cost study was used, there can be a question only about the three restated items, for all the other expense factors employed were those that had been explained on direct and subjected to the scrutiny of cross-examination and rebuttal. And so, the only real question before the District Court on appeal was whether there was a rational basis of support for the finding made as to these three restated items.

Because it would afford a ready demonstration to the District Court of the illusory nature of the appellants' claim that they simply could not take the Commission's report and, with the aid of the record, arrive at the expense factors used in the three restated items, the appellees, in their brief in the

District Court, made the arithmetical calculations[3] in an appendix. Still, this did not satisfy the appellants, for they say it cannot be done with the precision required. Amplifying this position, they urge in their Jurisdictional Statement that, of all the restated components, the most hopeless undertaking[4] was ascertainment of the origin car detention factor.

It requires some restraint to reply to this, for it is such an unwarranted assertion. This restatement of costs made by the Commission reduced the C&EI's car detention at Mt. Vernon from 2.01 to 1.80 days, the 2.01 days having been used by the eastern lines. The lower experience factor of 1.80 days reflected a weighting of the results of the two studies made by C&EI of the freight car detention at origin. Exhibit 87, introduced in *Ex-River Coal, Mt. Vernon, Ind., to Chicago District*, I. & S. 7011, *supra*, showed a detention of 1,352 cars for 2.01 days; and Exhibit 101 showed, during a later period of time, 765 cars were detained an average of 1.44 days. The weighted-average detention produced by these two C&EI studies developed an average car detention of 1.80 days. Accordingly, since it can be determined from the record that the origin car detention factor employed by the Commission simply reflected the use of all the evidence in the record concerning this characteristic of the movement, the finding made cannot be said to be beyond the record or

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[3] The appellants, at page 23 of their Jurisdictional Statement, assert that "the Commission, through its attorney, brought before the court working papers which seemed to reconcile the Commission's 'restated' cost with the record." If this implies that "working papers" were offered in evidence or shown to the District Court, this is incorrect. What the Commission did was simply to demonstrate, in an appendix to its brief, how the computations, which the appellants said could not be made, were derived.

[4] "This doesn't mean that the parties were as hopelessly at a loss to make a reasoned determination of how the Commission *probably* reached every restated component cost as they were in the case of origin car detention." (page 14)

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Ex-River Coal, Mt. Vernon, Ind., to Chicago District, I. & S. 7011, 308 I. C. C. 87, 91; 310 I. C. C. 181 ..... 5, 6, 7, 9, 10

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Watson Bros. Transportation Co. v. United States, 180 F. Supp. 732, 740 (D. Neb. 1960) 10

Statute

Administrative Procedure Act, 5 U.S.C.A. § 1009(e) 10

unknown to appellants, particularly since they had originally submitted the data in evidence. However, this is not all.

The appellants have actual knowledge how to make the calculations for, in their Petition for Reconsideration filed with the Commission, which was appended to the Complaint in the District Court, this same analysis was made by them of the evidence in the record pertaining to car detention at origin, with the conclusion reached that the weighted-average origin detention is 1.804 days.[5] If anything will, this should stultify any argument by C&EI and Ohio River Company that the report is deficient because it reaches a result which cannot be obtained from evidence in the record.

The second adjustment in the costs made by the Commission in its restatement reflected an acceptance of C&EI's position that the loaded cars would not be weighed for billing purposes and, therefore, this expense should not be included in the out-of-pocket operating costs.[5] However, the Commission found in *Barge-Rail Coal, Huntington, W. Va., to Chicago District*, I. & S. 7368, *supra*, at page 132:

> "The elimination of the cost of weighing at Brewer Yard does not support the contention of the Chicago & Eastern Illinois that the entire intertrain and intratrain switching expenses at that point should be excluded."

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[5] At page 7 of the Argument in Support of Petition for Reconsideration, attached as Appendix D to Complaint filed with the District Court by appellants, they said:

> "The cost study of the Commission does not, however, consider the proper car detention at origin. There are two studies of record of the freight car detention at origin. Exhibit 87, I. & S. Docket No. 7011, showed detention of 1352 cars for 2.01 days or a total of 2,717.52 days. Exhibit 101, I. & S. Docket 7011, introduced at the request of protestants, shows 765 cars in March 1958 were detained 1,102 days or an average of 1.44 days. The weighed average detention from these two studies disclose that the average detention at origin is 1.804 days."

While there was a statement by a C&EI witness that it was proposed the traffic would "run straight through," the evidence indicated the trains would be stopped at Danville, Illinois (Brewer Yard), for crew change. More important, the train weight employed from Mt. Vernon to Chicago of 5,916 tons[6] substantially exceeded the average daily tonnage,[7] 3,449.86 tons, of Mt. Vernon traffic moving to Chicago which would necessitate intertrain and intratrain switching to pick-up and set-off the additional traffic that would have to be handled if the train were to average 5,916 tons. The C&EI did not present any evidence to explain how it would obtain the missing 2,466.14 tons of daily traffic moving from Mt. Vernon to Chicago. Without such additional traffic, C&EI's proposed "straight through" operation would not be feasible. Further, the record contains no facts to support the unusual assumption that any train handling Mt. Vernon traffic would invariably operate from Mt. Vernon to Chicago, a distance of 305 miles, without handling other traffic to or from intermediate stations. Accordingly, there is substantial evidence in the record, including assumptions urged by C&EI, to justify a finding that at least one intertrain or intratrain switch would take place in the opera-

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[6]The train weight of 5,916 tons was developed by C&EI in *Ex-River Coal, Mt. Vernon, Ind., to Chicago District*, I. & S. 7011, *supra*, and used by the Commission in arriving at its cost conclusions in that case. Had the C&EI argued for a lower average train weight, it would have, of course, increased the cost of operation for, generally speaking, the greater the tonnage of traffic handled, the lower the out-of-pocket cost per ton, as the cost incurred is then distributed over the greater tonnage.

[7]Exhibit 11, introduced in *Barge-Rail Coal, Huntington, W. Va., to Chicago District*, I. & S. 7368, *supra*, shows that in the 213 days of 1960, covering the period from January through July, the latest information available at the time of the hearing, 734,822 tons of traffic moved via Mt. Vernon. The daily average tonnage during this period was, therefore, 3,449.86 tons.

tion of the various trains which handle Mt. Vernon coal to Chicago.[8]

The third adjustment made by the Commission in its restatement of costs involved the method of applying the trending factor used to produce costs that were currently incurred at the time of the hearing in September, 1960. The Form A study used, being predicated on average 1959 expense units, necessarily did not include any increases in wages or prices of materials subsequently incurred. The Cost Finding Section of the Interstate Commerce Commission, in its instructions accompanying the *Rail Carload Cost Scales by Territories*, indicates an approved method of developing this trending factor which was followed by the eastern lines in preparing their cost study.

The method of applying this factor employed by the Commission is the same as that followed in *Ex-River Coal, Mt. Vernon, Ind., to Chicago District*, I. & S. 7011, *supra*, which required the application of the trending factor to each of the underlying cost items, after an allowance for return was excluded. (See 308 I. C. C. 87, 91, fn. 7.) An arithmetical application of 2.9 per cent to the several pertinent expense unit factors affected produces the costs found by the Commission to be applicable in its restatement of costs.

The remaining assertion of deficiency in the Commission's report relates to one facet of Ohio River Company's cost of handling the traffic from Huntington to Mt. Vernon. The question raised relates to the application of a 2.9 per cent

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[8] Despite the above-cited evidence, appellants expressed sharp disagreement with the Commission's addition of a switching cost at Brewer Yard. Even assuming the Commission were in error, it was not *prejudicial* error because the outcome would not thereby be changed since the rate of $3.36 would still be below out-of-pocket cost. *Administrative Procedure Act*, 5 U.S.C.A. § 1009(e); *Watson Bros. Transportation Co.* v. *United States*, 180 F. Supp. 732, 740 (D. Neb. 1960).

trending factor to Ohio River Company's operating costs from Huntington to Mt. Vernon. This argument was urged to the District Court for the first time in the plaintiffs' reply brief. No evidence was cited in the record to show that this factor was incorrectly developed or applied. The Commission, in the case of Ohio River Company's costs, accepted the eastern lines' evidence, for it was unrebutted in the record and the cost testimony which was offered by Ohio River Company on direct could not be considered probative because of its refusal to supply any underlying data or working papers to support the bare conclusion offered.

There is substantial evidence in the record, considered as a whole, to support the conclusion of the Commission that the out-of-pocket cost incurred by Ohio River Company to handle the involved traffic from Huntington to Mt. Vernon is, at least, $1.268 and the out-of-pocket cost incurred by C&EI to handle the traffic from Mt. Vernon to Chicago is, at least, $2.1476, which produces a through out-of-pocket cost of $3.416. The higher of the two joint barge-rail rates at issue, $3.36, is, therefore, 5.6 cents per ton below the total out-of-pocket cost of performing the transportation service contemplated.

The second of the questions presented in the appellants' Jurisdictional Statement is as equally unsubstantial as the first and warrants no extensive consideration. The first problem encountered by appellants' second proposition is that it assumes too much. An essential premise is that C&EI accepts less revenue out of a "competitive" all-rail rate than it would receive from the joint barge-rail rate. The record before the Commission does not, however, support the conclusion that the all-rail rate referred to is competitive, for not one pound of coal moving via the Mt. Vernon route originated at mines served by those carriers who

participate in the all-rail rate cited. Conversely, the rate groups where the Mt. Vernon coal has originated are not served by those carriers participating in the all-rail route referred to by C&EI. All of the coal moving via Mt. Vernon originates at mines and in a rate group served either by The Chesapeake and Ohio Railway Company or Norfolk and Western Railway Company. The C&EI all-rail route is made only in connection with Louisville and Nashville Railroad Company which, since it has never originated a pound of this traffic and does not serve the rate group from which the coal is shipped, cannot be considered competitive in this movement. Before any proposition can be considered, substantial supporting facts must be established in the record. That is not the case here.

One further point. The appellants' second proposition engages in a bit of sophistry by seeking to create a straw man that can be struck down. The thrust of the argument is that the Commission found the C&EI out-of-pocket expenses exceeded its division of revenues and, therefore, condemned the joint barge-rail rates as unlawful.[9] It is acknowledged that the Commission did find C&EI out-of-pocket expenses exceeded the revenues that would be apportioned to it, but it did not condemn the rates under investigation for that reason. Rather, it ordered the joint rates cancelled because, as proposed, they were not compensatory.

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[9] "The attack is based upon the assertion that the barge-rail rate is noncompensatory, not because of any deficiency in the barge segment of the route (the division for which is conceded to be compensatory) but because of a deficiency in the rail portion thereof."

* * *

"The Commission accepted the argument of the attacking railroad and accordingly condemned the joint rate while leaving undisturbed the existing all-rail rates which are the source of discrimination against the River Company." (Appellants' Jurisdictional Statement, pages 32 and 33).

Thus, the appellants ask the Court to consider as a substantial question for review the contention that because the Commission adverted to the fact that the division received by the barge line covered its out-of-pocket costs but the railroad's portion did not, the rates were ordered cancelled because of the latter consideration. Not at all. Both the findings of the Commission and the decision of the District Court are addressed to the issue raised by the order instituting the investigation, which is the reasonableness and lawfulness of the joint rates proposed. Because they were found to be below the out-of-pocket cost of performing the service contemplated, they were ordered cancelled.

ARGUMENT

The Jurisdictional Statement has been cast in terms that do not accurately appraise the background of this litigation. The appellants draw a picture of themselves as embarking on a "unique experiment" which is the subject of "attack" by the eastern railroads. The C&EI asserts it "broke ranks" with the other railroad connections of The Ohio River Company and welcomed participation in the barge-rail rate *because* it had been denied participation in all-rail routes. Moreover, appellants assert that the joint barge-rail route created, because of the "inherent cheapness" of water transportation, would be more attractive than the all-rail routes.

There is nothing unique about this rate, for it is merely a routine effort of carriers, who would not normally participate in the movement of coal traffic from the southern Appalachian coal fields to Chicago, to gerrymander a route that could divert traffic from the direct and normal channels of trade. Why they wanted the business is understandable, but how they put the route together does not make their undertaking unique. The ensuing litigation, which the route

engendered, resulted from an order of investigation by the Interstate Commerce Commission directing the appellants to show that the rates proposed were just, reasonable and lawful. The fundamental character of the proceeding is not an attack by complaint of the eastern lines but, rather, an investigation upon Commission order. As for the reason why the C&EI joined in the rate, it is a real *non sequitur* to ascribe it to the asserted denial of participation in all-rail routes. A glance at a map confirms it is not realistic to expect that a railroad operating from Evansville or Mt. Vernon, Indiana, would participate in the movement of coal from southern West Virginia and eastern Kentucky fields to Chicago. Instead, C&EI "welcomed participation because" it was the only way it could possibly expect to divert this traffic to its lines. In doing so, however, it has not, as the appellants have asserted, created the low-cost operating route. The recent decision of the Commission in *Baltimore and Ohio Railroad Company, et al.* v. *Chicago and Eastern Illinois Railroad Company, et al.*, Docket 33706, decided January 28, 1963, ... I. C. C. ....., found that the all-rail routes of the eastern lines have the inherent advantage of cost when compared with the rail-river-rail route via Mt. Vernon.

Other equally chimerical attributes with which the appellants would cloak their position in this case could be cited; however, the most that can be said for the substance of their position is they apparently assume the burden of their complaint is satisfied without designating some substantial error in the Commission's restatement of cost which would deprive the conclusion reached of a rational basis of support. The unsubstantial nature of their request for review is that they, in effect, ask for further consideration even though they offer nothing more than an assertion that they are unable to comprehend the cost finding procedures employed

by the Commission. While the thesis of the appellants' plea —that they simply cannot understand the rationale of the Commission's conclusions concerning costs—is an interesting acknowledgment on their part, they should not be heard to make this argument, for any carrier regulated by the Commission is obliged to know the cost procedures it employs; and appellants must know how it was done in this case since they have peculiar knowledge of all factors involved.

If the rule were that the Commission must recite all the detail of mathematical calculations made in its cost analysis, its reports would be filled with trivia and minutiae which would add nothing to a reasonably informed litigant's knowledge and only encumber the real function which Congress has assigned to the administrative agency. It can be reasonably forecast that the result would be the courts' dockets would be burdened with frivolous appeals based on inconsequential mathematical errors or on inadvertent references which would have no material effect on the conclusions reached. Certainly, that was not the intent of Congress, and the courts have never held it was.

A recent proceeding, *General Motors Corporation v. United States*, 207 F. Supp. 641 (1962), outlines the limited obligation of the Commission to recite in its report the evidentiary facts relied upon. In this connection, the Court said at pages 647-8:

> "The Commission, as previously pointed out, is only required to set out ultimate, not evidentiary facts. Mills v. Lehigh Valley R. Co., supra [238 U. S. 473, 35 S. Ct. 888, 59 L. Ed. 1414]; Meeker & Co. v. Lehigh R. R. Co., supra [236 U. S. 412, 35 S. Ct. 328, 59 L. Ed. 644]; and need not make detailed findings of fact except in the case where damages are awarded, but need only file a written report stating its conclusions, together with its decision and Order. Alabama Great

Southern R. R. Co. et al. v. United States et al., supra [340 U. S. 216, 71 S. Ct. 264, 95 L. Ed. 225]. It is this Court's opinion that the Commission met these requirements.

"The precise contention here made by plaintiff that the Commission ignored certain material evidence, as indicated by its decision, which violated the requirements of 5 U.S.C.A. § 1007(b), was before a three judge court of this District in the case of Columbia Transportation Company v. United States, D. C., 167 F. Supp. 5, where the Court in a thorough, well-reasoned opinion said:

> 'The fact that the Commission did not in its report discuss various portions of testimony offered by plaintiffs, and give its reasons why it did not accept such evidence as controlling its decision, does not, in our opinion, constitute ignoring that evidence. Inasmuch as the Commission's report contained ultimate facts which it found from the record, it cannot be said that the Commission ignored any evidence that was before it. Failure to give to evidence the weight claimed for it by a party does not amount to ignoring such evidence.
>
> * * *
>
> 'We do not think that the Commission's report should be found inadequate because it did not discuss the evidence in detail. It is true that the report does not specifically refer to all of the evidence offered by the plaintiffs (protestants) but it was not necessary that the Commission first refer at length to the protestants' evidence and then say why it did not accept it or why it gave greater weight to evidence opposed to it. If the findings expressed the Commission's essential factual conclusions, and such conclusions constitute the basis for the Commission's disposition of the matter before it, it impresses us that such findings are sufficient.'

"Also see United States v. Pierce Auto Freight Lines, supra, 327 U. S. 515, at p. 529, 66 S. Ct. 687, at p. 695, where the Court stated:

> 'Given that the report contains all essential findings required, c.f. [State of] Florida v. United States, 282 U. S. 194, [51 S. Ct. 119, 75 L. Ed. 291] the Commission is not compelled to annotate to each finding the evidence supporting it.'"

Particularly pertinent is the following language from *Boston and Maine Railroad* v. *United States*, 153 F. Supp. 952, at page 958, which deals with the role of the Court in reviewing evidence and findings of the Commission as to cost of transportation:

> "It is plain that, in reviewing the decision of the Commission, our function is not to pass in detail on the evidence of costs. By virtue of long-standing rulings of the Supreme Court, these are matters solely for the judgment of the administrative agency. In Illinois Commerce Commission v. United States, 1934, 292 U. S. 474, 481, 484, 54 S. Ct. 783, 786, 78 L. Ed. 1371, the Court said:
>
> > 'Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts. See Manufacturers' Ry. Co. v. United States, 246 U. S. 457, 481, 38 S. Ct. 383, 62 L. Ed. 831; Assigned Car Cases 274 U. S. 564, 580, 47 S. Ct. 727, 71 L. Ed. 1204.

"* * * Appellants reach their conclusion as to the reasonableness of the interstate rate by disregarding the cost study as evidence because, as is contended, it was erroneously considered by the Commission. But as we have already said it was for the Commission to determine whether the cost study was adequate or whether it was necessary to refine or supplement it in order to make it dependable evidence for the purpose of rate making. The study itself afforded evidence of the reasonableness of the rate fixed, and upon the whole record there was abundant support for the Commission's finding, which was carefully and thoroughly considered in its report. There is no basis upon which the courts, not authorized to weigh evidence, could reexamine or disregard its conclusion.' See also Ayrshire Collieries Corp. v. United States, 1949, 335 U. S. 573, 593, 69 S. Ct. 278, 93 L. Ed. 243."

The principles enunciated above are applicable here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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PROOF OF SERVICE

I, John W. Hanifin, one of the attorneys for the Rail Carrier Appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D. C., by mailing by air mail a copy thereof, properly addressed to said parties.

Dated at Richmond, Virginia, this 14th day of August, 1963.

.....

JOHN W. HANIFIN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and THE OHIO RIVER COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellant, Chicago & Eastern Illinois Railroad Company (C&EI) and The Ohio River Company (River Company) submit this brief in opposition to the motions to affirm filed by the United States of America and the Interstate Commerce Commission (Government motion) and by the intervening defendants (Eastern Railroad motion).

The motions to affirm are addressed not to the report of the Commission as written but to the report as govern-

ment counsel might have written it. The report as written does not accept protestants' study of rail costs with three specified adjustments. As written, the report indicates only that protestants' study was generally accepted, but restated so as to produce different indicated amounts in eight of the ten service catagories shown in an appended table. The parties were left to reconstruct the restated answers from the record, and thus to determine, if possible, which of their opposing contentions had been accepted and which rejected. Only government counsel, privy to the Commission's staff and underlying records, could reconstruct the Commission's cost determination from the record, or nearly so. (They had difficulty with Brewer yard switching.)

Appellants seek no ruling to require disclosure of arithmetical trivia. The first question raised in the jurisdictional statement is directed to whether the facts assumed and procedures followed by the Commission in reaching a dispositive determination of carrier costs are set forth with sufficient clarity and precision to inform the parties and a reviewing court that there was a rational basis for the Commission's order. A reasoned surmise as to the nature of that rational basis is not enough. Assurances given by counsel who must defend the Commission's order as to what the Commission did or did not do come too late. The rational basis for a determinative cost conclusion must be contained in the report itself, not in a deductive reconstruction of the decisional process.*

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* On page 4 of the Government motion, the Commission's rail cost determination is described. The supporting references are not to the Commission report; but to the findings of fact in the lower court, which, in turn, substantially represent the proposed findings of fact submitted by counsel for the Government and for the Eastern Railroads.

Both motions defend the application of a 2.9% trending factor to barge cost on the ground that there was no contrary evidence. (Government motion footnote 5, page 6, and the Eastern Railroad motion, page 11.) This disregards the fact, acknowledged at page 3 of the Eastern Railroad Motion, that the Commission had accepted, for the sake of decision at least, appellants' assertion that the rate in issue was an initial rate. The burden, therefore, rested upon those attacking it, not upon the carrier proposing it.

The argument is made with respect to the second question presented that it was not preserved for court review, and that, in all events, the discriminatory division of the all-rail rate with the Louisville & Nashville Railroad Company applies from a different and non-competitive origin rate group. But the section 3(4) argument was vigorously pressed before the Commission, and, as both Government counsel and counsel for the Eastern Railroads concede, before the lower court in written and oral argument. The point is sufficiently included within the complaint in the general allegation contained in paragraph 11G.

The $4.75 per ton rate, of which the C&EI accepts only $1.66 for its haul from Evansville to Chicago, applies from "Eastern High Volatile District" to Chicago. (Ex. 1 before the Commission) This is the same rate district from which coal is transported to the river for movement via the River Company to interchange with the C&EI at Mt. Vernon, and thence beyond to Chicago. The $4.75 rate was, in fact, established in 1959 so as to equalize the then-existing charges via the competitive rail-water-rail route. See *Eastern Coal to Chicago, Ill.*, 306 ICC 195 (Div. 2, 1959) which, at page 197, reconstructed the through rail-river-rail charge from the high volatile ("Inner Crescent") district.

CONCLUSION.

For the reasons stated herein, and in Appellants' Jurisdictional Statement, it is submitted that the questions presented by this appeal are substantial and important and this Court should note probable jurisdiction.

Respectfully submitted,

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